TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]56

THE ROBERT MITCHELL FURNITURE COMPANY, PLAINTIFF IN ERROR,

vs.

SELDEN BRECK CONSTRUCTION COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 15, 1920.

(27,685)

(27,685)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 930.

THE ROBERT MITCHELL FURNITURE COMPANY, PLAINTIFF IN ERROR,

vs.

SELDEN BRECK CONSTRUCTION COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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Supreme Court of the United States

October Term: 1919.

No. _____.

Record.

Error from the District Court of the United States for the Southern District of Ohio.

Pleas at a separate session of the Court of Common Pleas within and for the First Judicial District began and held at the Court House in the City of Cincinnati, County of Hamilton and State of Ohio, in the Term of April, A. D. 1919, before the Honorable Otway J. Cosgrave, one of the Judges of said Court.

PETITION.

(Filed June 20, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 170735. *vs.*

SELDEN BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri,

Defendant.

Be It Remembered, That on the 5th day of April, A. D. 1919, came the above named plaintiff, by its attorney, and filed in the Office of the Clerk of said Court, its certain Petition and Precipe herein against the above named defendant, clothed in words and figures following to-wit:

Now comes the plaintiff and for its cause of action says that it is a corporation organized and existing under and by virtue of the laws of the State of Ohio with its principal place of business in the City of Cincinnati, State of Ohio; that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and that it has procured from the Secretary of State a certificate that it has complied with the requirements of law to do business in Ohio.

Plaintiff further says that on or about the 3rd day of January, 1917, it entered into a written contract with the defendant at Cincinnati, Ohio, under and by virtue of the terms of which contract, the plaintiff agreed to provide all the materials and perform all the work for the manufacturing at its factory in Cincinnati, Ohio, and delivering F. O. B. cars Ann Arbor, Michigan, all the interior cabinet wood work in the white for the Library Building of the University of Michigan, in accordance with certain specifications and drawings referred to in said contract and which by its terms became a part thereof and that it was mutually agreed between the plaintiff and the defendant, that the defendant was to pay for said work and materials the sum of thirteen thousand ($13,000.00) dollars, in installments as follows: eighty-five (85) per cent. of the architects estimate of the value of the materials shipped the preceding month and the balance thirty (30) days after the completion of the work as aforesaid.

Plaintiff further says that in addition thereto, the said plaintiff upon the order and direction of the defendant herein, did extra work in connection with the said contract for the additional sum of one hundred twenty-six dollars and sixty cents ($126.60).

Plaintiff further says that the contract provided that the plaintiff was to start deliveries of the said material on August 1st, 1917, and make complete deliveries within sixty (60) days thereafter provided complete measures for the manufacturing of the whole of said work were obtainable on or before March 1st, 1917; that the

said material was not delivered within said time because the complete measures were not obtainable on or before March 1st, 1917, and on account of the act, neglect and default of the said defendant; and that the condition of the contract requiring that the said material to be delivered on or within a certain period, was waived by the said defendant by accepting performance of said contract after said date.

Plaintiff further says that the defendant agreed to provide all the labor and materials not to be performed or furnished by the plaintiff in such a manner as not to delay the material progress of the work and in the event of failure so to do, thereby causing loss to the plaintiff, the said defendant agreed that it would reimburse the said plaintiff for such loss.

Plaintiff further says that it completed its part of the contract on or about the 15th day of February, 1919, and that it has complied with all the terms and conditions of the contract as aforesaid on its part to be performed, with the exception of those terms and conditions waived by the defendant as herein set forth.

Plaintiff further says that the defendant has made all payments under said contract as herein set forth without demanding from the said plaintiff the estimate of the architects referred to by reason of which the said defendant has waived the condition of the contract that the money due on the contract shall be paid on the architects estimate of the value of the materials shipped the preceding month.

Plaintiff further says that the defendant has failed to perform the terms and conditions of the said contract on its part to be performed in the following particulars, to-wit: The defendant has made payments to the plaintiff and has received credits amounting to the sum of ten thousand, six hundred seventy-four dollars and sixteen cents ($10,674.16) and no more, and that there is a balance due from the defendant to the plaintiff on the said contract price and for extras, the sum of two thousand four hundred fifty-two dollars and forty-four cents ($2,-

452.44); that the said defendant has failed to provide all the labor and materials not to be performed and furnished by the said plaintiff in such a manner as not to delay the material progress of the work and as a result has delayed the material progress of the work, causing loss to the plaintiff in the sum of eight thousand, twenty-four dollars and fifty-four cents ($8,024.54); that the defendant has failed and refused and still fails and refuses to pay the plaintiff the sum of ten thousand, four hundred seventy-six dollars and ninety-eight cents ($10,476.98), all to the damage of said plaintiff.

Wherefore, plaintiff asks for judgment against the defendant in the sum of ten thousand, four hundred seventy-six dollars and ninety-eight cents ($10,476.98) with interest from the 1st day of April, 1919, and for its costs herein incurred.

Leo J. Brumleve, Jr.,
Attorney for Plaintiff.

State of Ohio, Hamilton County, ss.:

Mark L. Mitchell being first duly sworn says that he is Secretary of the plaintiff company and that the facts set forth in the foregoing petition are true so he verily believes.

Mark L. Mitchell.

Sworn to before me and subscribed in my presence this 4th day of April, 1919.

Leo J. Brumleve, Jr.,
(Seal.) Notary Public in and for
Hamilton County, Ohio.

$.40 due Notary.

Precipe.

To the Clerk:

Issue summons to the Sheriff of Franklin County, Ohio, on the defendant, the Selden Breck Construction Company, by serving its agents Simeon Nash, Ruggery Building, Columbus, Ohio, returnable according to law and endorse, "action for money only, amount claimed

ten thousand, four hundred seventy-six dollars and ninety-eight cents ($10,476.98) with interest from the 1st day of April, 1919."

Leo J. Brumleve, Jr.,
Attorney for Plaintiff.

Summons Issued to Sheriff of Franklin, Co., O.
(Apr. 5, 1919.)

The State of Ohio, Hamilton County, ss.
To the Sheriff of the County of Franklin:

You are commanded to notify Selden Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri, Defendant, that it has been sued by the Robert Mitchel Furniture Company, a corporation organized and existing under the laws of the State of Ohio, Plaintiff in the Court of Common Pleas of Hamilton County, and that unless it answer by the 3rd day of May, A. D. 1919, the petition of the said plaintiff against it filed in the Clerk's Office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summon on the 14th day of April, A. D. 1919.

Witness my hand and the seal of the said Court at Cincinnati this 5th day of April, one thousand nine hundred and nineteen.

Fred E. Wesselmann,
(Seal.) Clerk of the Court of Common
Pleas of Hamilton County, Ohio.
By Frank Lewis, Deputy.

Endorsements on Back of Summons.

Summons in action for Recovery of Money only. Amount claimed $10,476.98 with interest from the 1st day of April, A. D. 1919. $5.00 deposited for service of this writ. Fred E. Wesselmann, Clerk, by Frank Lewis, Deputy. For which judgment will be taken if you fail to answer. To 14th day of April, 1919.

Leo J. Brumleve,
Attorney.

Summons Returned.

(Apr. 22, 1919.)

Sheriff's return, Franklin County, Ohio.

On the 14th day of April, A. D. 1919, I served the within named defendant Selden Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri, by personally handing a true copy of this writ with all the endorsements thereon to Simeon Nash, Agent. After due and diligent search I was unable to find the President, Vice President, Secretary, Treasurer or other chief officers within my bailiwick.

William M. Slack,
Sheriff of Franklin County, Ohio.
By Steve Donohoe.

Sheriff fees, $1.61.

Alias Summons Issued to Sheriff of Franklin Co., O.

(April 22, 1919.)

The State of Ohio, Hamilton County, ss.:
To the Sheriff of the County of Franklin.

Again you are commanded to notify Selden Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri, Defendant, that it has been sued by the Robert Mitchell Furniture Company, a corporation organized and existing under the laws of the State of Ohio, Plaintiff, in the Court of Common Pleas of Hamilton County, and that unless it answer by the 24th day of May, A. D. 1919, the petition of the said plaintiff against it filed in the Clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 5th day of May, A. D. 1919.

Witness my hand and the seal of the said court at Cincinnati this 22nd day of April, one thousand nine hundred and nineteen.

Fred E. Wesselmann,
(Seal.) Clerk of the Court of Common
Pleas of Hamilton County, Ohio.
By Albert Swing, Deputy.

Endorsement on Back of Said Summons.

Alias Summons in action for money only. Amount claimed $10,476.98 with interest from the 1st day of April, A. D. 1919. Money deposited on account of Sheriff of Franklin County, Ohio, for service of the writ. Fred E. Wesselman, Clerk; by Albert Swing, Deputy. For which judgment will be taken if you fail to answer. To 5th day of May, 1919.

Leo J. Brumleve, Jr.,
Attorney.

Motion to Set Aside Return of Sheriff.

(Filed by leave April 22nd, 1919, Min. 2473.)

Now comes the plaintiff and moves the court to quash the service of summons and to set aside the return of service of the Sheriff of Franklin County on the ground that the return was not made on or before the second Monday after the suit was filed and the summons issued and for leave to issue another summons against the defendant.

Leo J. Brumleve, Jr.,
Attorney for Plaintiff.

Entry Quashing Summons and Setting Aside the Return of the Sheriff of Franklin Co., O.

(Entered April 22, 1919, Min. 2473.)

This cause having come on to be heard on the motions of the plaintiff to quash the service of summons and to set aside the return of the service of summons made by the Sheriff of Franklin Co. on the ground that the return is not valid because it was not made on or before the second Monday after the suit was filed and the summons issued, to-wit, April 14, 1919, and the matters having been fully presented to the court, the court hereby grants said motion.

It is therefore considered that the service of summons be quashed and the return of the Sheriff of Franklin Co., made on the 21st day of April, 1919, be set aside.

The Clerk is hereby directed forthwith to issue a

precipe for an alias summons upon the defendant to the Sheriff of Franklin Co., returnable according to law.

Enter, Cosgrave, J.

Entered April 22, 1919. Minute 2473.

Alias Summons Returned.

(April 25, 1919.)

Sheriff's Return, Franklin County, ss.:

Received this writ April 23rd, A. D. 1919, at 9 o'clock A. M. and pursuant to its command on the 23rd day of April, A. D. 1919, I served the within named defendant Selden Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri, by personally handing a true and duly certified copy of this writ with all the endorsements thereon to Simeon Nash, Agent and the person designated on whom service can be made; I being unable to find the President, Vice President, Secretary, Treasurer or other chief officers within my bailiwick.

William M. Slack,
Sheriff, Franklin County, Ohio.
By R. W. Presnell, Deputy.

Sheriff fees $1.21.

Motion to Quash Service of Summons.

(Filed April 30, 1919.)

Now comes the defendant, Selden Breck Construction Company, and not entering its appearance herein but appearing herein only for the purpose of this motion to quash the service of summons upon it herein moves the court that the service of summons purporting to have been made upon the defendant by the Sheriff of Franklin County, Ohio, on the 14th day of April, 1919, be vacated and set aside and held for naught upon the grounds that the same is contrary to law and of no force and effect as follows:

First, for the reason that said pretended service purports to have been made on the return day of the summons.

Second, for the reason that said summons was not returned by the said Sheriff within the time provided by law.

Selden Beck Construction Company,
By Williams & Nash,
Its Attorneys.

Memorandum.

The appearance is made in this case for no purpose whatsoever except that of quashing the service of the original summons. The same purports to have been served on the 14th day of April, 1919, which was the return day of the summons. Section 11286 of the General Code requires that the summons must be served on or before the return day.

Also the records show that the summons was not returned until after the return day, whereas the same section (Sec. 11286 of the General Code) requires that the return must be made on or before the return day mentioned in the summons. Under Meisse vs. McCoy's Admr., 17 O. S., 225, the motion must be sustained.

Respectfully submitted,
Williams & Nash,
Attorneys for Selden Breck Construction Company.

Entry Overruling Motion to Quash Service of Summons, Defendant Excepts.

(Entered May 6, 1919. Min. 2514.)

This cause having come on to be heard on the motion of the defendant to quash the service of summons and the matter having been fully presented to the court, the court on due consideration finds that the motion is not well taken and hereby overrules the same, to all of which counsel for the defendant excepts.

Enter, Cosgrave, J. O. K.

Leo J. Brumleve, Jar.,
Attorney for Plaintiff.

Notice of Removal.

(Entered May 6, 1919. Minute 2514.)

(Filed May 21, 1919.)

Mr. Leo J. Brumleve,

Attorney for plaintiff.

Please take notice that the defendant will present a petition and bond on removal to the United States District Court, Southern District of Ohio, Western Division, to the Court of Common Pleas, Court Room No. 7 at 2 o'clock p. m., Wednesday, May 21st, 1919. Copies of petition and bond are herewith.

Selden Breck Construction Company,
By Williams & Nash,
Its Attorneys.

Receipt of the above notice is acknowledged this 21st day of May, 1919.

Leo J. Brumleve, Jr.,
Attorneys for Plaintiff,
The Robert Mitchell Furniture Co.

Petition for Removal to U. S. Court.

(Filed May 21, 1919.)

Petition of defendant for removal to United States District Court.

To the Honorable, The Court of Common Pleas, within and for the County of Hamilton, State of Ohio:

Your petitioner respectfully shows to this Honorable court that the matter and amount in dispute in the above entitled suit exceeds the sum or value of three thousand dollars exclusive of interest and costs; that the controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of the suit, and still is, a corporation organized and existing under the laws of the State of Missouri, with its principal place of business at St. Louis, in the State of Missouri, and that at the time of the commencement of this suit, it was and still is a resident of and a citizen of the

State of Missouri, and a non-resident of the State of Ohio; and that the said plaintiff at the time of the commencement of said suit was, and still is, a corporation organized under the laws of the State of Ohio, with its principal place of business at Cincinnati, Ohio, and that said plaintiff was then and still is a citizen and resident of the State of Ohio.

And your petitioner offers herewith a good and sufficient surety for his entering in the District Court of United States, for the Southern District of Ohio, Western Division, within thirty days from the date of the filing of this petition, a copy of the record in this suit, and for paying all costs that may be awarded by the said District Court, if said court should hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and cause the record herein to be removed into the said District Court of the United States in and for the Southern District of Ohio, Western Division and your petitioner will ever pray.

Selden Breck Construction Co.,
By Daniel Breck, President.

Williams & Nash,
Attorneys for Petitioner.

State of Missouri, City of St. Louis, ss.:

Daniel Breck being first duly sworn says that he is the President of the said Selden Breck Construction Company and that the foregoing petition is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters that the same is true as he verily believes.

Daniel Breck.

Sworn to before me and subscribed in my presence this 16th day of May, 1919.

Aurelius W. Wenger,
(Seal.) Notary Public,
City of St. Louis, Missouri.

My term expires Oct. 6, 1922.

Entry Removing Cause.
(Entered May 22, 1919.)

Cincinnati, May 21, 1919.

Petition granted and cause removed.

Otway J. Cosgrave,
Judge of the Court of Common Pleas,
Hamilton County, Ohio.

(Filed May 21, 1919.)

Bond on Behalf of Petitioner on Removal to United States District Court.

KNOW ALL MEN BY THESE PRESENTS:

That Selden Breck Construction Company, a corporation organized under the laws of the State of Missouri, as principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland authorized to do business as a Surety Company within the State of Ohio, as surety, are held and firmly bound unto the Robert Mitchell Furniture Company, a corporation organized under the laws of the State of Ohio in the sum of five hundred ($500.00) dollars for the payment of which, well and truly to be made unto the said The Robert Mitchell Furniture Company, its successors and assigns, the said Selden Breck Construction Company and The U. S. Fidelity & Guar. Co. bind themselves and their successors and assigns firmly by these presents, upon the condition, nevertheless that

Whereas the above named, The Robert Mitchell Furniture Company has heretofore brought a suit of civil nature in the Common Pleas Court of Ohio within and for the County of Hamilton against the said Selden Breck Construction Company and

Whereas the said Selden Breck Construction Company simultaneously with the filing of this bond intends to file its petition in the said suit in such State court for the removal of such suit into the District Court of the United States in the District where such suit is pending,

to-wit: The Southern District of Ohio, Western Division, according to the provisions of the Acts of Congress in such cases made and provided, Now, therefore, the condition of this obligation is such that if the said petitioner Selden Breck Construction Company shall enter in the District Court of the United States of the Southern District of Ohio, Western division within thirty days from the filing of said petition for removal a copy of the record in such suit and shall well and truly pay all costs that may be awarded by the said District Court, if said court shall hold that such suit was wrongfully or improperly removed thereto and shall also appear and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

In witness whereof, the said Selden Breck Construction Company and The United States Fidelity & Guaranty Company, have caused these presents to be signed by their respective officers and attorneys in fact thereunto duly authorized and their corporate seals to be hereto affixed, this 16th day of May, 1919.

Selden Breck Construction Company,
(Seal.) By Daniel Breck, President.
United States Fidelity & Guaranty Company,
(Seal.) By Harry B. Hupp, Atty.-in-fact.

State of Missouri, City of St. Louis, ss.:

On the 16th day of May, 1919, before me, the undersigned a Notary Public within and for the county aforesaid personally appeared the above named Selden Breck Construction Company by Daniel Breck, its President, the corporation described in the foregoing instrument, whose officer as aforesaid acknowledged the execution in the foregoing instrument to be the voluntary act and deed of said corporation for the uses and purposes therein stated.

(Seal.) Aurelius W. Wenger,
Notary Public, City of St. Louis, Missouri.

State of Ohio, County of Hamilton, ss.:

On the 21st day of May, 1919, before me, the undersigned, a notary public within and for the county aforesaid, personally appeared the above named The United States Fidelity & Guaranty Company, The Surtey Company described in the foregoing instrument by Harry B. Hupp, Its Attorney in fact, who acknowledged the execution of the foregoing instrument to be the voluntary act and deed of said surety company for the uses and purposes therein stated.

(Seal.) Thomas J. Elliott,
Notary Public, County of Hamilton, Ohio.
My term expires March 22nd, 1921.

Cincinnati, May 21, 1919.

The above bond is hereby accepted and approved and accepted.

Otway J. Cosgrave,
Judge of the Court of Common Pleas,
Hamilton County, Ohio.

The State of Ohio, Hamilton County, ss:

I, Fred E. Wesselmann, Clerk of the Court of Common Pleas, within and for the County and State aforesaid, do hereby certify the within and foregoing to be a true and correct Transcript of the Record in the Case No. 170735, wherein The Robert Mitchell Furniture Company is Plaintiff and Selden Breck Construction Company is Defendant, as appears from the files and records now in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of said Court, at Cincinnati, this twenty-third day of May, A. D. 1919.

(Seal) Fred E. Wesselmann,
Clerk of the Court of Common Pleas of
Hamilton County, Ohio.
By W. L. Giesler, Deputy.

PRAECIPE FOR ALIAS SUMMONS.

(Filed June 23, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio, Plaintiff.

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri, Defendant.

To B. E. Dilley,
Clerk of said court:

Please issue alias summons on the defendant The Selden Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri by serving Simeon Nash, Ruggery Building, Columbus, Ohio, the agent designated by the defendant upon whom process can be had against it under the Statute of Ohio, returnable according to law and endorse "Action for money only, amount claimed $10,476.98 with interest from the 12th day of April, 1919."

L. J. Brumleve, Jr.,
Attorney for plaintiff.

ALIAS SUMMONS AND MARSHAL'S RETURN.

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation, etc., Plaintiff,

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation, etc. Defendant.

The President of the United States of America,
To the Marshall of the Southern District of Ohio, Greeting:

You are commanded to notify Selden Breck Construc-

tion Company, a corporation organized and existing under the laws of the State of Missouri, Defendant, if it be found in your district, that it has been sued by The Robert Mitchell Furniture Company, a corporation organized and existing under the laws of the State of Ohio, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, O., and that unless it answer by the 26th day of July, A. D. 1919, the petition of said Plaintiff against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 7th day of July, A. D., 1919.

Witness the Honorable Howard C. Hollister, Judge of the District Court of the United States, this 23rd day of June, A. D. 1919, and in the 143rd year of the Independence of the United States of America.

(Seal.)

Attest, B. E. Dilley, Clerk.
By T. V. Lamb, Deputy.

Received this Writ on the 23rd day of June, A. D. 1919, and on the 24th day of June, A. D. 1919, served same on the Selden Breck Construction Company, a corporation, etc., by delivering a true copy of this writ, with the endorsements thereon, to Simeon Nash, Agent designated by the defendant upon whom service of process can be had against it under the Statutes of Ohio by handing the same to him personally, at Columbus, Ohio.

M. Devanney, Marshall, S. D. O.
By Louis F. Miller, Deputy.
By J. Norrish, Deputy.

MOTION TO QUASH SERVICE OF ALIAS SUMMONS IN STATE COURT.

(Filed July 19, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio, Plaintiff.

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri, Defendant.

Now comes the defendant named in this action and protesting against the jurisdiction the court of Common Pleas of Hamilton County, Ohio, from which this cause was removed and also against the jurisdiction of this court, and not in anywise entering its appearance herein, but appearing only and solely for the purpose of objecting to the jurisdiction of said Common Pleas Court and this court over it moves the court that the pretended issuing and service of alias summons pretended to have been made upon it by the Sheriff of Franklin County, Ohio, on the 23rd day of April, 1919, be vacated, set aside and held for naught and that the same be quashed for the reasons following:

1. Said pretended service of summons is illegal and contrary to law.

2. Said pretended service of summons is contrary to the provisions of the statutes in such cases made and provided.

3. That there is no authority in law for the filing or prosecution of this action against the defendant in the said Court of Common Pleas originally or in this court on removal for the reason that the defendant, was not at any time found within the County of Hamilton, State of Ohio, nor did the pretended cause of action of the plaintiff, or any part thereof, pretended to be alleged in the petition herein arise within the County of Ham-

ilton, State of Ohio, all as provided for and required in Section 11276 of the General Code of Ohio, for the institution and prosecution of an action in the Hamilton County Common Pleas Court.

4. That said pretended service of said alias summons purports and pretends to have been made upon one Simeon Nash, as the statutory agent of the defendant company under the provisions of Section 179 of the General Code of Ohio for the purpose of service of summons, but that there was no authority in law for the service of summons in this action upon such agent, in that the cause of action alleged by the plaintiff did not arise out of and is not in any way connected with any business done on transactions had by the defendant company at any time within the State of Ohio.

5. That although the defendant had heretofore from time to time transacted business within the State of Ohio within the meaning of the provisions of Section 178 and 179 of the General Code of Ohio, it has not so transacted any such business since the 26th day of October, 1918; that since said date it has not had any officer or representative or employee within the state of Ohio for the purpose of transacting any business therein other than the said statutory agent appointed under the provisions of Section 179 of the General Code of Ohio and that at the time of the pretended institution of this action and the pretended service of said alias summons upon it herein the defendant was not transacting business within the State of Ohio within the meaning of the provisions of Sections 178 and 179 of the General Code of Ohio and that the cause of action pretended to have been alleged by the plaintiff herein does not in any way arise out of and is not in any way connected with any business done or transactions had by the defendant company at any time within the State of Ohio.

6. That the contract alleged in the petition was not made or entered into within the state of Ohio and that the cause of action alleged in the petition did not arise, nor did any part of it arise within the State of Ohio, and

that the cause of action alleged in the petition is not in any way connected with and does not arise out of any business transacted by the defendant at any time within the State of Ohio, and that if said Sections 178 and 179 of the General Code of Ohio are construed as giving jurisdiction over the defendant in such an action, and as subjecting the defendant to the jurisdiction of said Common Pleas Court, and this court, then that said Sections 178 and 179 violate the provisions of Section 1, Article 14, of the amendments to the Constitution of the United States of America in that they deprive this defendant of property without due process of law.

7. Other reasons which will appear upon an inspection of the record in this case.

Selden Breck Construction Company,
By Williams & Nash,
Its Attorneys.

MOTION OF DEFENDANT TO QUASH ISSUING AND SERVICE OF PRETENDED ALIAS SUMMONS IN THE DISTRICT COURT.

(Filed July 19, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio, Plaintiff.

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri, Defendant.

Now comes the defendant, above named, and protesting against the jurisdiction of the Court of Common Pleas of Hamilton County, Ohio, from which said cause was removed, and against the jurisdiction of this court, and not in anywise entering its appearance herein, but appearing solely and only for the purposes of this motion, moves the court that the pretended issuing and service

of a certain document issued out of this District Court on the 23rd day of June, 1919, pretended to be entitled "alias summons" herein, and which is pretended to have been served upon the agent of the defendant company at Columbus, Ohio, in the Eastern Division of said Southern District of Ohio on the 24th day of June, 1919, be vacated, set aside and held for naught, and that the same be quashed, for the reasons following:

1. Said so called and pretended "alias summons" is illegal and void.

2. Said pretended service is illegal and contrary to law.

3. Said pretended service is contrary to the provisions of the acts of Congress in such cases made and provided.

4. That there is no authority in law for the issuing of any such "alias summons" out of this court.

5. That, without admitting that there is any authority in law for the issuing of any such pretended "alias summons" out of this court, there is no authority in law for the pretended service thereof in the Eastern Division, of the Southern District of Ohio, and any such pretended service thereof is void and of no effect.

6. That there is no authority in law for the filing or prosecution of this action against the defendant in the said Court of Common Pleas originally, or in this court on removal, for the reason that the defendant, was not at any time found within the County of Hamilton, State of Ohio, nor did the pretended cause of action of the plaintiff, or any part thereof, pretended to be alleged in the petition herein arise within the County of Hamilton, State of Ohio, all as provided for and required in Section 11276 of the General Code of Ohio, for the institution and prosecution of an action in the Hamilton County Common Pleas Court.

7. That said pretended service of said pretended alias summons in this court purports and pretends to have been made upon one Simeon Nash, as the statutory agent of the defendant company under the provisions of

Section 179 of the General Code of Ohio for the purpose of service of summons, but that there was no authority in law for the service of summons in this action upon such agent, in that the cause of action alleged by the plaintiff did not arise out of and is not in any way connected with any business done on transactions had by the defendant company at any time within the State of Ohio.

8. That although the defendant had heretofore from time to time transacted business within the State of Ohio within the meaning of the provisions of Sections 178 and 179 of the General Code of Ohio, it has not so transacted any such business since the 26th day of October, 1918; that since said date it has not had any officer or representative or employee within the state of Ohio for the purpose of transacting any business therein other than the said statutory agent appointed under the provisions of Section 179 of the General Code of Ohio and that at the time of the pretended institution of this action and the pretended service of said pretended "alias summons" in this court herein the defendant was not transacting business within the State of Ohio within the meaning of the provisions of Sections 178 and 179 of the General Code of Ohio and that the cause of action pretended to have been alleged by the plaintiff herein does not in any way arise out of and is not in any way connected with any business done or transactions had by the defendant company at any time within the State of Ohio.

9. That the contract alleged in the petition was not made or entered into within the State of Ohio and that the cause of action alleged in the petition did not arise, nor did any part of it arise within the State of Ohio, and that the cause of action alleged in the petition is not in any way connected with and does not arise out of any business transacted by the defendant at any time within the State of Ohio, and that if said Sections 178 and 179 of the General Code of Ohio are construed as giving jurisdiction over the defendant in such an action, and as subjecting the defendant to the jurisdiction of said

Common Pleas Court, and this court, then that said Sections 178 and 179 violate the provisions of Section 1, Article 14 of the amendments to the Constitution of the United States of America in that they deprive this defendant of property without due process of law.

7. Other reasons which will appear upon an inspection of the record in this case.

Selden Breck Construction Company,
By Williams & Nash.
Its Attorneys.

OPINION.

(Filed December 11, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY,
Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION COMPANY,
Defendant.

Peck, District Judge.

On motions of the defendant to quash service in state court and to quash service of summons in United States District Court.

The motion filed in the state court to quash the service was there overruled. The renewal of that motion here is discretionary. Remington vs. Central Pacific R. R., 198 U. S., 95.

A foreign corporation may be sued in Ohio only in a county in which it has property or in which there are debts owing to it, or where it may be found, or the cause of action or some part thereof arose. General Code of Ohio, Section 11276. If the action be rightly begun in any county, summons may be issued to any other county. Id. Section 11282.

It does not affirmatively appear that the defendant had any property or that there were debts owing to it within Hamilton County. It is urged that the defendant, having complied with the law of the state permitting

foreign corporations to do business therein by the designation of an agent, may be found, constructively, within any county of the state. It is apparent from its context that Section 11276, supra, is exclusive, and the word "found" means actually found by agent upon whom summons may be served. Blanton vs. Burroughs Adding Machine Co., 13 O. N. P. (N. S.), 423, is cited to the contrary, but it does not appear from the report of that case that the cause of action did not arise in the county. In Handy vs. Ins. Co., 37 O. S., 366, cited by plaintiff, the defendant was served within the county and also entered voluntary appearance.

No place of payment is specified in the contract, but the court is unable to find anything in its contents from which it may be inferred that payment was to be made at Cincinnati; and the case is therefore to be distinguished from Lumbermen's Insurance Co. vs. Meyer, 197 U. S., 417. The contract having been made in Illinois, that was presumptively the place of payment. Weyand vs. Park Terrace Co., 202 N. Y., 231; Annotated Cases, 1912D, p. 1010, note, p. 1014. No breach occurred in Ohio, and no part of the cause of action arose here. The motion to quash the state service is therefore granted.

The motion to set aside summons issued out of this court will be overruled on authority of McCullough v. United Grocers' Corp., 247 Fed., 880; Lebensberger v. Scofield et al, 139 Fed., 380; and U. S. Fidelity & G. Co. v. Board of Commissioners, 145 Fed., 144.

For Plaintiff: Leo J. Brumleve, Jr., Cincinnati, Ohio.

For Defendant: Williams, Nash, Hays & Thomas, Columbus, Ohio.

Addenda:

Counsel have called the attention of the court to the fact that the service against which defendant's motion to quash in the state court was directed was that of April 14, 1919, and that this service was quashed upon the motion of the plaintiff, and thereafter defendant's motion to quash the same was overruled and that the de-

fendant did not, in the state court, move to quash the alias summons therein issued, all of which appears upon further examination of the record to be correct.

However, that difference has no effect upon the foregoing opinion, except, perhaps, to make irrelevant the first paragraph thereof.

ENTRY.

(Filed December 17, 1919.)

THE ROBERT MITCHELL FURNITURE CO., a corporation, etc.,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation (Mo.), etc.,

Defendant.

This cause having come to be heard on the motion of the defendant to quash the service of alias summons issued by the Court of Common Pleas, Hamilton County, State of Ohio, and the matter having been fully presented to the court, the court on due consideration thereof finds that said motion is well taken and does hereby grant the same, to all of which plaintiff by its counsel excepts.

This cause further having come on to be heard on the motion of the defendant to quash the service of alias summons issued by the District Court of the United States, Southern District of Ohio, Western Division, and the matter having been fully presented to the court, the court finds that the said motion is not well taken and the same is hereby overruled, to all of which defendant by its counsel excepts.

Defendant is hereby given until January 10, 1920, to plead further.

Peck, J.

NOTICE OF FILING BILL OF EXCEPTIONS.

(Filed December 17, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY,
Plaintiff,
No. 2779. vs.
SELDEN BRECK CONSTRUCTION COMPANY,
Defendant.

To the plaintiff above named:

You are hereby notified that the defendant has filed its bill of exceptions, upon the hearing of the two motions to quash the service of summons, in the above entitled cause, and that the same will be presented to His Honor, John W. Peck, Judge of the District Court of the United States, at the United States Court Room, Federal Building, Cincinnati, Ohio, in said Division of said District, on the 23rd day of December, 1919, at 9:30 o'clock A. M., and that the defendant will then and there ask said Judge to sign, seal, allow and settle the same.

Selden Breck Construction Company,
By Williams & Nash.
Its Attorneys.

Service of the above notice is hereby acknowledged this 17th day of December, 1919.

Leo J. Brumleve, Jr.,
Attorney for Plaintiff.

ENTRY.

(Filed December 17, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY,
Plaintiff,
No. 2779. vs.
SELDEN BRECK CONSTRUCTION COMPANY,
Defendant.

Permission is given to the defendant to use the original affidavits, deposition, and certificate of the Secre-

tary of State of Ohio heretofore filed herein for the purpose of attaching the same as exhibits to the bill of exceptions upon the hearing of the two motions of defendant to quash the service of summons.

Peck, J.

BILL OF EXCEPTIONS ALLOWED DEC. 23, 1919.

(Filed December 23, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri,

Defendant.

Be it remembered that on the hearing of the above entitled cause in the above named court, before the Honorable John W. Peck, District Judge, sitting at Cincinnati, Ohio, in the Western Division of the Southern District of Ohio, on the 13th day of January, 1919, upon the motion of the defendant to quash the service of alias summons purporting to have been made in the Common Pleas Court of Hamilton County, Ohio, and the motion of defendant to quash the service of alias summons purporting to have been made in the District Court of the United States for the Southern District of Ohio, Western Division, both of said motions having been filed herein on the 19th day of July, 1919, the defendant in support of said motions offered and introduced the following testimony, to-wit:

Present on behalf of plaintiff, Leo J. Brumleve, Jr.

Present on behalf of defendant, Simeon Nash.

Counsel for defendant made the statement that he

was only appearing for the purpose of these motions to quash service of summons.

The defendant thereupon offered in evidence the affidavit of George B. Williams, sworn to October 6th, 1919, before Anna M. Linster, Notary Public, Cook County, Ill., and the said affidavit was thereupon marked defendant's "Exhibit A" and there being no objection, the said affidavit was received in evidence and is attached hereto and marked "Exhibit A" and made part hereof.

The defendant thereupon offered in evidence the affidavit of Theo. Gosen, sworn to October 1st, 1919, before Aurelius W. Wenger, Notary Public, City of St. Louis, Mo., being an affidavit setting forth a copy of a certain contract between the plaintiff and defendant, and the said affidavit was thereupon marked defendant's "Exhibit B" and there being no objection the said affidavit was received in evidence and is attached hereto and marked "Exhibit B," and made a part hereof.

The defendant thereupon offered in evidence the affidavit of Theo. Gosen, sworn to October 1st, 1919, before Aurelius W. Wenger, Notary Public, City of St. Louis, Mo., being an affidavit setting forth certain tax reports to the Tax Commission of Ohio and the said affidavit was thereupon marked defendant's "Exhibit C" and there being no objection, the said affidavit was received in evidence and is attached hereto and marked "Exhibit C," and made a part hereof. The defendant thereupon offered in evidence the affidavit of Theo. Gosen, sworn to October 1st, 1919, before Aurelius W. Wenger, Notary Public, City of St. Louis, Mo., being an affidavit setting forth statement of payments made by defendant to plaintiff, and the said affidavit was thereupon marked defendant's "Exhibit D" and there being no objection, the said affidavit was received in evidence and is attached hereto and marked "Exhibit D" and made a part hereof.

The defendant thereupon offered in evidence the affidavit of H. L. Campbell, sworn to October 2nd, 1919, before Aurelius W. Wenger, Notary Public of the City of St. Louis, Mo., and the said affidavit was thereupon

marked defendant's "Exhibit E" and there being no objection the said affidavit was received in evidence and is attached hereto and marked "Exhibit E" and made a part hereof.

The defendant thereupon offered in evidence the affidavit of Theo. Gosen, sworn to on the 21 day of July, 1919, before Aurelius W. Wenger, Notary Public, City of St. Louis, Mo., and the said affidavit was thereupon marked defendant's "Exhibit F" and there being no objection the said affidavit was received in evidence and is attached hereto and marked "Exhibit F" and made a part hereof.

Thereupon the defendant offered in evidence a certified copy of the records in the office of the secretary of State of Ohio, regarding the defendant company, and the same was marked "defendant's Exhibit G" and the same was thereupon received in evidence and is attached hereto and marked "Exhibit G" and made part hereof.

Thereupon the defendant rested.

And thereupon the plaintiff in opposition to said motions offered in evidence the deposition of Theodore H. Gosen taken before Andrew H. Watson, Notary Public, City of St. Louis, Mo., and the same marked "Plaintiff's Exhibit No. 1," and the same received in evidence and is attached hereto and marked "Exhibit No. 1" and made a part hereof.

Thereupon the plaintiff offered in evidence the affidavit of Mark L. Mitchell, sworn to on the 28th day of November, 1919, before Leo J. Brumleve, Jr., Notary Public, Hamilton County, Ohio, and the same was received in evidence and marked "Exhibit 2," and attached hereto and made a part hereof.

Thereupon the plaintiff rested.

And the foregoing is all of the testimony, evidence and exhibits offered or introduced in evidence by either of the parties hereto upon the hearing of the said two motions of the defendant to quash the service of summons.

And thereafter on the 17th day of December, 1919, the court ordered and decreed as is shown by the decree of

the said court upon the said motions entered of record in said cause on the 17th day of December, 1919, to which judgment and decree of the Court in granting and sustaining the motion of the defendant to quash the service of alias summons issued out of the Court of Common Pleas, of Hamilton County, Ohio, the plaintiff excepted, and to which judgment and decree of the court in overruling the motion of the defendant to quash the service of alias summons alleged to have been made in the District Court of the United States, for the Southern District of Ohio, Western Division, the defendant excepted.

And now in furherance of justice and that right may be done, the plaintiff, The Robert Mitchell Furniture Company, tenders and presents the foregoing as its Bill of Exceptions, upon the hearing of the motion to quash the service of alias summons issued out of the Court of Common Pleas of Hamilton County, Ohio, and prays that the same may be settled and allowed, and signed, and sealed by the court, and made a part of the record and the same is accordingly done this 23rd day of December, 1919.

And now in furtherance of justice, and that right may be done the defendant, Selden Breck Construction Company, appearing only for the purpose of the said motions, and not appearing for any other or further purpose, and still protesting against the jurisdiction of the court, tenders and presents the foregoing as its Bill of Exceptions upon the hearing of said motions and prays that the same may be settled and allowed and signed and sealed by the court, and made a part of the record, and the same is accordingly done this 23rd day of December, 1919.

In witness whereof, the judge of said court has hereunto attached his official signature as such this 23rd day of December, 1919, and during the term of said court at which said decree was made, and within the time allowed by the court for preparing and filing this bill of exceptions.

John W. Peck,
Judge of the District Court of the United States, Southern District of Ohio.

EXHIBIT A—AFFIDAVIT.

(Filed December 6, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri,

Defendant.

State of Illinois, County of Cook, ss.:

George B. Williams being first duly sworn says that until recently he was the manager of and in charge of the office of the Selden Breck Construction Company at Chicago, Illinois; that prior to January 18, 1917, he had prepared a contract between the said The Selden Breck Construction Company and The Robert Mitchell Furniture Company in connection with the library building of the University of Michigan and had prior to said date forwarded the said contract in three copies, from his office at Chicago, Illinois, to The Robert Mitchell Furniture Company at Cincinnati, Ohio; that on January 18, 1917, the three copies of the said proposed contract between The Selden Breck Construction Company and The Robert Mitchell Furniture Company, certain changes having been made in the form thereof by The Robert Mitchell Furniture Company that the said three copies were received by affiant in due course of mail at Chicago together with a letter dated January 18, 1917, concerning the same, a true copy of which letter is attached hereto and marked Exhibit A and made a part hereof; that on January 30, 1917, he wrote to The Robert Mitchell Furniture Company at Cincinnati from his office in Chicago a letter, a true copy whereof is attached hereto and

marked Exhibit B and made a part hereof said letter being written by him on behalf of The Selden Breck Construction Company making certain suggestions regarding the changes previously made by The Robert Mitchell Furniture Company in form of the contract; that said letter was duly mailed on said date; that about February 1, 1917, he received in due course of mail at Chicago from The Robert Mitchell Furniture Company a letter dated January 31, 1917, a true copy whereof is attached hereto and marked Exhibit C and made a part hereof, the same being in reply to his letter of January 30, 1917, and the same making certain counter proposals in regard to the changes to be made in the contract; that upon receipt of this letter of January 31st or shortly thereafter changes were made in said contract in accordance with this said letter of January 31st and that the same was thereupon duly executed by affiant on behalf of The Selden Breck Construction Company at Chicago, Ill., and that said contract after being so executed was delivered to Mr. B. S. Michelson, at Chicago, Illinois, who was agent and the representative of The Robert H. Mitchell Furniture Company; that on February 10, 1917, from his office in Chicago, Illinois, he wrote a letter to the plaintiff at Cincinnati, a true copy whereof is attached hereto and marked Exhibit D and made a part hereof; the same stating that the corrections had been made in the contract in accordance with the plaintiff's said letter of January 31, 1917, and that the same was duly mailed.

Affiant further says that on or about February 13, 1917, he received at Chicago, Illinois, a letter dated February 12, 1917, from The Robert Mitchell Furniture Company acknowledging receipt of his letter of the 10th and stating that it had received the said contract, a copy of which letter of February 12, 1917, is attached hereto and marked Exhibit E.

Affiant further says that he is and was familiar with the business of the defendant company, and that said contract with the plaintiff had no connection whatsoever

with any business or transactions of said defendant in the State of Ohio, but that on the contrary it had to do entirely and only with the erection of a library building at the University of Michigan at Ann Arbor, in the State of Michigan.

Further Affiant saith not.

George B. Williams.

Sworn to before me and subscribed in my presence by said affiant this 6th day of October, 1919.

Anna M. Linster,
Notary Public, Cook County, State of Illinois.

(Seal.)

My Commission expires March 10th, 1920.

EXHIBIT A.

(Copy.)

Cincinnati, 1-18-17.

Selden Breck Construction Company,
Chicago, Ill.

Dear Sirs:

We are returning herewith properly signed in triplicate, contract for the Michigan Library.

You will note that we have made some additions and corrections to the contract form. In the first place, we have amplified the reading of the subject matter to be performed by us under the contract. If you will check this over you will find that this is absolutely correct and it will make more certain a clearer understanding between us on just what is to be furnished and just what is to be omitted.

Your form being a building contract form wherein the complete erection is contemplated, contains clauses which are not applicable to a contract contemplating merely the delivery of material f. o. b. cars, and we have therefore made some additions and omissions and corrections to this form to bring it down to a form which we consider fair and equitable to cover a contract for material which we are to furnish.

If you find this correct, kindly execute one of these contracts and return to us and oblige.

Yours truly,

(Signed.) The Robert Mitchell Furniture Co.,
Per: W. Ledyard Mitchell.

EXHIBIT B.

(Copy.)

Chicago, Ill., Jan. 30, 1917.

Robert Mitchell Furniture Co.,
Cincinnati, Ohio.

In Re U. of M. Library.

Gentlemen:

Replying to yours of Jan. 18th with which you return the contracts for the work at Ann Arbor.

The changes you have made are satisfactory with one or two exceptions.

In the sixth line from the bottom of the first page you mention that no stair work is included. This should read "no stair work excepting wood hand rails."

In regard to the completion date. It is manifestly impossible to secure complete measurements on or before March first, 1917, as we have not even wrecked the old building. It may be possible to establish measurements to which we may work by that time. In any event, this clause wont do. What have you to suggest?

Yours very truly,

Selden Breck Construction Company,
(Signed.) Geo. B. Williams,
Manager.

EXHIBIT C.

(Copy.)

Cincinnati, 1-31-17.

Selden Breck Construction Company,
Peoples Gas Building,
Chicago, Ill.

In Re U. of M. Library.

Gentlemen:

Replying to your letter of the 30th inst. relative to the contract form, you can alter the sixth line from the bottom of the first page to read "stair work except wood hand rails which are to be furnished by this Contractor, templates for same to be furnished by the Owner."

In regard to the date of completion, we suggest that this be written provided complete measures for the manufacture of the several portions and the whole of the work are obtainable four months prior to the date when deliveries are to commence. We feel that this will straighten the matter out, for the reason that if we can't get measures by April, you will not be ready for the trim by August. In addition to this, if you are able to establish measures and agree to build to them this will be just as satisfactory to us as the measures actually taken from the building. The whole point is, that it is going to take four months to manufacture this work as it should be made and the work can not be made piece-meal as it was not figured to be made that way and the price will not allow of it. When we set up to make a certain run of mouldings, trims or doors, we must be able to make them all and to make all of this work is going to take every bit of four months.

We trust that we have made this clear and that you will see the justice of our request, as it is just as important to you as it is to ourselves. If you will change the contract as suggested herewith, sign and return the same it will be very satisfactory to us.

Yours truly,

(Signed.) The Robert Mitchell Furniture Co.,
Per: W. Ledyard Mitchell.

EXHIBIT D.

(Copy.)

Chicago, Ill., Feb 10, 1917.

Robert Mitchell Furniture Co.,
Cincinnati, Ohio.

In Re U. of M. Library.

Gentlemen:

We have made corrections in the contract in accordance with your recent letter.

In view of the fact that you want four months to start deliveries after receipt of all information, kindly give us at once a list of all details and other information required. Also prepare your shop drawings at once, and indicate any dimensions which will have to be established, and any other information that will be required so that you may proceed.

Yours very truly,
Selden Breck Construction Company,
(Signed.) Geo. B. Williams,
Manager.

EXHIBIT E.

(Copy.)

Cincinnati, Feb. 12, 1917.

Selden Breck Construction Co.,
People's Gas Bldg.,
Chicago, Ill.

In Re U. of M. Library.

Gentlemen:

We acknowledge receipt of your letter of the 10th inst. and the contract has just come to hand.

Will kindly ask you to forward the following details at once:

Details of Typical, leather covered, and tin one side, doors.

Details of Typical and tin one side door openings.

Details of Corridor Borrowed lights such as shown on 3rd and 4th floors.

Details of Borrowed lights bet. rooms 102, 101, & 100, 1st floor.

Details of Borrowed lights bet. Corridors and rooms 7, 9, & 13.

Details of Borrowed lights bet. Room 209 and stairway, 2nd floor.

Details of Stall doors.

Details of Wainscot, partitions, etc,, in main reading room No. 200.

Details of Wainscot, and counter in deliver corridor, 2nd floor.

Details of Base, cap rail, partition, etc., in study room, 1st floor.

Details of Wainscot, counter, etc., in study room, 1st floor.

Thanking you in advance for your immediate attention to the above, we remain,

Yours truly,
The Robert Mitchell Furniture Company,
Per: W. Ledyard Mitchell.

EXHIBIT B—AFFIDAVIT.

(Filed December 6, 1919.)

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri,

Defendant.

State of Missouri, City of St. Louis, ss.:

Theodore Gosen, being duly sworn on his oath states that he is the Secretary and Auditor of the Selden Breck Construction Company, the defendant above named, and as such is in charge of its books, records, finances and accounts; that he is familiar with the contract between the plaintiff and the defendant in this case, with reference to the furnishing of woodwork and materials for the Library Building, at the University of Michigan, Ann Arbor, Michigan; that a true and correct copy of said contract is hereto annexed, marked Exhibit A, and made a part hereof.

Further affiant saith not.

Theo. Gosen.

Subscribed and sworn to before me this 1st day of October, 1919.

(Seal.) Aurelius W Wenger,
Notary Public, City of St. Louis, Missouri.

My commission expires October 6, 1922.

EXHIBIT A.

Albert Kahn, Archt. and Ernest Wilby, Asst.

This agreement, made the third day of January, in the year one thousand nineteen hundred seventeen by and between Robt. Mitchell Fur. Co. of Cincinnati, O., a corporation organized under the laws of the State of Ohio, party of the first part, hereinafter designated the Contractor and Selden Breck Construction Co., of St. Louis, a corporation organized under the laws of the State of Missouri, party of the second part, hereinafter designated the Owner.

Witnesseth: That the Contractor, in consideration of the fulfillment of the agreements herein made by the Owner, agrees with the said Owner, as follows:

Article I. The Contractor, under the direction and to the satisfaction of Albert Kahn, Archt. & Ernest Wilby, Assoc., Architect, hereinafter designated the Architect, shall and will provide all the materials and perform all the work mentioned in the specifications or shown on the

drawings prepared by the said Architect for manufacturing and delivering, f. o. b. cars, Ann Arbor, Mich., in the white, no painters finish whatsoever, all interior cabinet woodwork specified under the heading of "Inside Finish" on pages 97 to 107 and as shown on sheets No. 1 to 8 and 10 to 22, dated 9-16-16, No. 23 dated 5-20-16; Nos. 24 and 25 dated 9-16-16, No. 26 dated 5-20-16; Nos. 27 to 31 dated 9-16, all marked for architect's job No. 663.

In strict accordance with the architect's drawings heretofore mentioned, Bulletin No. 28 and as described in the specifications heretofore mentioned. The general conditions, pages 1 to 13 inclusive, where same applies to work that is done away from the building site, in the shop of the subcontractor, are also a part of this contract.

It is understood and agreed that as this contract covers merely material delivered f. o. b. cars that applying painters finish and erecting said material will constitute an acceptance thereof.

In the foregoing it is understood and agreed that the following work is to be furnished by this Contractor: Pantesote covered doors, the tin and asbestos covering on the inside of shaft doors only, as specified on sheet No. 5.

In the foregoing it is understood and agreed that the following work will not be furnished by this Contractor: Any cabinet work for temporary purposes or work for future portions, any work to be done at the building. There is to be no charge for prorate expense, nothing foreign to the cabinet work is to be included nor the application of same such as glass, mirrors, hardware, registers, Kalamein or tinned doors or openings, marble base, cork, linoleum, asbestos or tin lining of radiator recesses, stair-brackets, rubber or brass strips on double doors, no fitting or hanging of doors, transoms, etc., no rough carpentry of any kind such as bucks, sleepers, floors, ladders, grounds, stairwork, except wood hand rails (templates for same to be furnished by owner) drain boards.

No shelving or supports such as occur in the main corridor, second floor (see page 104 specification Main reading room, 2nd floor (See page 104 specification) and Study Room No. 104, 1st floor (see page 105 Specification). No filing cabinets or tables in connection with same in Main Corridor or Librarian's Room 2nd floor.

Article II. The Architect will furnish to the Contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the drawings and specifications referred to in Article I.

It is mutually understood and agreed that all drawings and specifications are to remain the property of the Architect.

Article III. The owner shall have the right to make any alterations in the work under this contract, but only upon the written order of the Architect. The value of the work added or omitted shall be agreed between the parties hereto and the amount so ascertained shall be added to or deducted from the contract price. Should the parties be unable to compute the value of said work in advance, the work shall proceed under the Architect's order, and the parties shall compute said value as soon as practicable. In case the parties fail to agree upon the valuation of the work added or omitted shall be referred to an arbitrator as provided in article IX.

Article IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives.

Article V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained; the Architect shall be at liberty, after five days written notice to the Contractor, to provide any such labor or materials and to deduct the

cost thereof from any money then due or thereafter to become due to the Contractor under the contract, and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner or the Architect shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under the contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the owner to the Contractor, but if such expense shall exceed such unpaid balance the Contractor shall pay the difference to the Owner. The expense incurred by the Owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such fault, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties, provided, however, if said Owner, or Contractor, shall dispute the justice of the Architect's decision in the matter of said damages, then either of them may have such disputed matter referred to arbitration, under Article IX of this agreement, by serving notice of his demand therefor upon the other party within three days after receiving notice of such decision.

Art. VI. The Contractor shall complete the several portions and the whole of the work embodied in this Agreement by and at the time or times hereinafter stated, to-wit: Contractor shall be prepared to start deliveries on August 1st, 1917, and make complete deliveries within 60 days thereafter. Provided complete measures for the manufacturing of the several portions and the whole of

this work are obtainable four months prior to the date when deliveries are to commence, provided that the Owner gives possession of the premises on or before

Time is an essential part of this Agreement; and if the Contractor's work is not completed on or before dates mentioned in this Article, or the extension of the same, as provided in Article VII, the Contractor shall forfeit to the Owner all damages suffered by the owner by reason of such default for each and every day.

Article VII. Should the Contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner or the Architect, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or floods, cyclone, or by the abandonment of the work by the employes during a strike, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architect.

Article VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damages for which Owner shall become liable (as above stated) then he shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect subject to the right of arbitration by either party hereto.

Article VIII-A. It is further agreed between the patties hereto that the said Contractor shall not sublet or assign this contract or the doing of the work to any other

person, firm or corporation or to any other contractor or sub-contractor without the written consent of the owner.

Article IX. All questions in dispute under this contract, concerning the quantity, quality, character and value of the work performed, the completion of the work, the amount of money due the contractor and damages sustained to either party by failure on the part of the other party to comply with the contract, shall be submitted to arbitration at the choice of either party. The demand for arbitration shall be made in writing at any time after the dispute arises, but not later than thirty (30) days after the Contractor notifies the Owner, that, in his opinion, he has completed his work. The parties may agree upon one arbitrator; otherwise there shall be three (3), one named in writing by each party, and the third chosen by these two (2) arbitrators. Should the party demanding arbitration fail to name an arbitrator within ten (10) days of his demand, his right to arbitration shall lapse. The decision of any two (2) of the arbitrators shall be final and conclusive on both parties. The arbitrators shall assess the costs of the arbitration upon either or both parties. The award of the arbitrators must be in writing and if in writing shall not be open to objection on account of the form of the proceedings of the award.

Article X. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Thirteen thousand ($13,000.00) dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments. Each installment shall represent 85 per cent. of the value of the materials shipped the preceding month. The 15 per cent. reserved shall be payable 30 day after the completion of this contract.

The final payment shall be made within 30 days after this contract is fulfilled.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said

premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

Article XI. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article XII. The Owner, shall, during the progress of the work, maintain full insurance on said work, against loss or damage by fire; the policies shall cover all work incorporated in the building, and shall be made payable to the parties hereto, as their interests may appear. Should the Owner refuse or neglect to insure, then the Contractor may do so and charge the cost of same to Owner.

Article XIV. The Contractor shall provide all statements, affidavits, waivers, etc., required by the Lien Laws of this state, at such times and in the form required by said laws to protect the Owner against mechanic's or other liens, and hereby acknowledge receipt of notice from the Owner or Architect to furnish same.

Article XV. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these pres-

ents have hereunto set their hands and seals the day and year first above written.

In presence of

The Robert Mitchell Furniture Co.,
Cincinnati, Ohio. (seal)
R. H. Mitchell, Vice President, (seal)
Selden Breck Construction Co.,
By G. B. Williams.

EXHIBIT C—AFFIDAVIT.

(Filed December 6, 1919.

Theo. Gosen being first duly sworn says that he is the Secretary of The Selden-Breck Construction Company and that as such Secretary he has from time to time executed and filed with the tax commission of the State of Ohio the annual reports of the said Selden-Breck Construction Company; that Exhibit A attached hereto and made a part whereof, is a true copy of the report for the year 1918 and that the same was filed with the tax commission of Ohio on July 16, 1918; that Exhibit B attached hereto and made a part whereof is a true copy of the annual report of said Selden-Breck Construction Company; filed with the tax commission of Ohio on the 21 of July 1919.

Further affiant saith not.

Theo. Gosen.

Subscribed and sworn to before me this 1st day of October, 1919.

(Seal.) Aurelius W. Wenger,
Notary Public, City of St. Louis, Missouri.

My term expires October 6, 1922.

EXHIBIT A.

1918

ANNUAL REPORT OF A FOREIGN CORPORATION.

Preserve one copy for reference.

This report must be filed with the Tax Commission of Ohio during the month of July.

A corporation failing or neglecting to file its report within the time prescribed is subject to a penalty of ten dollars per day for each day's omission.

The annual fee charged for the privilege of exercising its franchises in this state, must be paid to the Treasurer of State on or before the first day of December. A corporation failing or neglecting to pay such fee, within the prescribed time, shall be subject to a penalty of fifteen per cent. of the amount of the fee required to be paid by it.

N. B. All items called for in this blank must be given in full. Where possible report should be typewritten.

July 10, 1918.

To the Tax Commission of Ohio, Columbus, Ohio.

The undersigned, a foreign corporation, for profit, in compliance with an act of the General Assembly of the State of Ohio, entitled, "An act to repeal sections 5446 to 5542-8, inclusive, and 5542-10 to 5542-24, inclusive, of the General Code, as enacted May 10, 1910 (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties," passed May 31, 1911, hereby makes the following report.

1. The name of the corporation is Selden Breck Construction Company.

2. It is organized under the laws of the State of Missouri.

3. The location of its principal office is St. Louis, City of St. Louis, State of Missouri.

4. The names of its President, Secretary, Treasurer and Members of the Board of Directors, with the post office of each are as follows:

President—Daniel Breck, St. Louis, Mo.

Secretary—Theodore Gosen, St. Louis, Mo.

Treasurer—Geo. W. Herthel, Clayton, Mo.

Board of Directors—Daniel Breck, St. Louis, Mo.; Geo. W. Herthel, Clayton, Mo.; H. L. Campbell, St. Louis, Mo.; G. A. Buder, St. Louis, Mo.; C. J. Wendling, Maplewood, Mo.

5. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state are as follows.

Name of office or agency (none). Name of Officer or Agent in charge of its business in Ohio, Simeon Nash, P. O. Address of officer or agent, Columbus, Ohio.

6. Officer to whom correspondence concerning this report and notice for payment of fee should be addressed; Geo. W. Herthel, Vice President and Treasurer, 1108 Fullerton Building, St. Louis, Mo.

7. The date of the annual election of its officers is second Monday of September of each year.

8. The amount of its authorized capital stock is, $125,000.00.

9. The par value of each share of its capital stock is $100.00.

10. The amount of its capital stock subscribed is $125,000.00.

11. The amount of its capital stock issued is $125,000.

12. The amount of its capital stock paid up is $125,000.00.

13. The nature and kind of business in which the company is engaged is general contracting and building constructing.

14. The nature and kind of business transacted in Ohio is building construction.

15. Value of property owned and used in Ohio. None.

16. Detailed statement of property in Ohio—kind and value. None.

17. The total value of the property owned and used by the company in the state of Ohio. None.

18. The amount of business transacted in Ohio during the preceding 12 months ending June 30, 1919, $31,174.

Sum of Items 17 and 18, $31,174.

19. Value of property owned and used outside of Ohio and where situated, $13,760.

LOCATION.	VALUE. True or Actual.	As Assessed for Taxation.
Omaha, Nebraska,	$2,550.00	$2,550.00
Ann Arbor, Michigan,	3,710.00	2,000.00
St. Louis, Mo.	3,500.00	2,992.00
Fort Sill, Oklahoma,	1,500.00	None
Wichita, Kansas,	2,000.00	1,050.00
Chicago, Illinois,	500.00	200.00
Grant Total,	$13,760.00	$8,792.00

20. Detailed statement of property outside of Ohio—kind and value:

Real Estate, none. Leases, none. Personal property, materials, merchandise and supplies, $11,060.00. Moneys, credits and investments, $2,700.00. Good Will, patents, trademarks, and other intangible values, none. Other personal property, none.

21. The total value of the property owned and used by the company outside of Ohio is $13,760.00.

22. The amount of business transacted outside of Ohio during the preceding 12 months was $5,588,055.00.

23. The total value of all the property owned and used by the company is $13,760.00.

24. The total amount of business transacted by the company during the preceding 12 months was $5,619,229.

The sum of items 23 and 24, $5,632,989.00.

25. The company qualified to do business in Ohio on 17th day of October, 1910.

26. The change or changes in the above particulars (called for under items 8 to 22 inclusive) made since filing the last annual report, are as follows: change of officers, value of property and business done during the year.

Attached herewith is a true and correct list of the stockholders in this company residing in Ohio, showing the name, address and number of shares held by each.

In witness whereof, said corporation has caused its corporate seal to be hereto attached, and this report to be executed, by its Secretary, this 10th day of July, 1919.

The Selden Breck Construction Company.

By Signed Theo. Gosen, Secretary.

State of Missouri, City of St. Louis, ss.

Theo Gosen being duly sworn, deposes and says that he is the Secretary of the Selden Breck Construction Co., that he executed the foregoing report in the name and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirectly, paid, used, or offered, consented or agreed to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

Signed Theo. Gosen, Secretary,

Sworn to before me, and subscribed in my presence, this 12th day of July, A. D., 1918.

Signed Aurelius W. Wenger, Notary Public.

My term expires October 6, 1918.

No stockholders in Ohio.

Endorsed on back.

Annual report of The Selden Breck Construction Co., State of Mo. Authorized capital stock, $125,000. Proportion represented by property and business in Ohio, $690 in pencil by Tax Commissioner. Filed in the office of the Tax Commission of Ohio, at Columbus, 7-16-18.

EXHIBIT B.

1919

ANNUAL REPORT OF A FOREIGN CORPORATION.

Preserve one copy for reference.

This report must be filed with the Tax Commission of Ohio during the month of July.

A corporation failing or neglecting to file its report within the time prescribed is subject to a penalty of ten dollars per day for each day's omission.

The annual fee charged for the privilege of exercising its franchises in this state, must be paid to the Treasurer of State on or before the first day of December. A corporation failing or neglecting to pay such fee, within the prescribed time, shall be subject to a penalty of fifteen per cent. of the amount of the fee required to be paid by it.

N. B. All items called for in this blank must be given in full. Where possible report should be typewritten.

July 16th, 1919.

To the Tax Commission of Ohio, Columbus, Ohio.

The undersigned, a foreign corporation, for profit, in compliance with an act of the General Assembly of the State of Ohio, entitled, "An act to repeal sections 5446 to 5542-8, inclusive, and 5542-10 to 5542-24, inclusive, of the General Code, as enacted May 10, 1919, (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties," passed May 31, 1911, hereby makes the following report:

1. The name of the corporation is Selden-Breck Construction Company.

2. It is organized under the laws of the state of Missouri.

3. The location of its principal office is St. Louis, City of St. Louis, State of Missouri.

The names of its President, Secretary and members of the Board of Directors, with the postoffic address of each are as follows:

President, Daniel Breck; address, St. Louis, Mo.

Secretary, Theo. Gosen, address, St. Louis, Mo.

Treasurer, Geo. W. Herthel, address, Clayton, Mo.

Board of Directors, Daniel Breck, St., Louis, Mo.; H. L. Campbell, St. Louis, Mo.; G. A. Buder, St. Louis, Mo.; George W. Herthel, Clayton, Mo.; C. J. Wendling, Maplewood, Mo.

5. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state are as follows:

Name of office or agency, none; Name of office or agent in charge of its business in Ohio, Simeon Nash; P. O. address of officer or agent, Columbus, Ohio.

6. Officer to whom correspondence concerning this report and notice for payment of fee should be addressed:

George W. Herthel, Vice President and Treasurer, 1108 Fullerton Building, St. Louis, Mo.

7. The date of the annual election of its officers is second Monday of September of each year.

8. The amount of its authorized capital stock is $125,000.

9. The par value of each share of its capital stock is, $100.

10. The amount of its capital stock subscribed is, $125,000.

11. The amount of its capital stock issued is $125,000.

12. The amount of its capital stock paid up is, $125,000.

13. The nature and kind of business in which the company is engaged is general contracting and construction.

14. The nature and kind of business transacted in Ohio is general contracting and construction.

15. Value of property owned and used in Ohio, separated by counties, none.

16. Detailed statement of property in Ohio, none.

17. The total value of the property owned and used by the company in the state of Ohio is, none.

18. The amount of business transacted in Ohio during the preceding 12 months ending June 30, 1919, $10,544.91.

19. Value of property owned and used outside of Ohio and where situated.

	True or Actual.	As assessed for Taxation.
Omaha, Neb.	$1,575.00	$1,175.00
Ann Arbor, Mich.	2,000.00	1,200.00
St. Louis, Mo.	2,500.00	1,500.00
Ft. Sill, Okla., ...	4,621.12	None Gov. contract
Wich. Falls, Texas, ..	4,743.87	3,000.00
Columbus, Ga.	22,207.01	None Gov. contract
Grand total,		$37,647.00 $6,875.00

20. Detailed statement of property outside of Ohio—kind and value: Personal property, material, merchandise and supplies, $37,647.00; moneys, credits and investments, $58,410.00; other personal property, $35,521.25.

21. The total value of the property owned and used by the company outside of Ohio is $37,647.00.

22. The amount of business transacted outside of Ohio during the preceding 12 months was $2,490,654.53.

23. The total value of all the property owned and used by the company is $37,647.00.

24. The total amount of business transacted by the company during the preceding 12 months was $2,538,846.44.

25. The company qualified to do business in Ohio on 17th day of October, 1910.

26. The change or changes, in the above particulars made since filing the last annual report, are as follows: Amount and place of business.

In witness whereof, Said corporation has caused its corporate seal to be hereto attached, and this report to be executed, by its secretary, this 16th day of July, 1919.

The Selden-Breck Construction Company.

(Company's Seal.)

By (Signed) Theo. Gosen.

State of Missouri, City of St. Louis, ss.

Theo. Gosen, being duly sworn, deposes and says that he is the Secretary of the Selden-Breck Construction Company, that he executed the foregoing report in the

name of and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirestly, paid, used, or offered, consented or agreed to pay or use any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

Theo Gosen.

Sworn to before me, and subscribed in my presence, this 16th day of July, A. D. 1919.

(Signed) Aurelius W. Wenger, Notary Public. (Seal.)

My term expires October 6, 1922.

Endorsed on back.

No. 939. Foreign Corporation. Annual report of The Selden Breck Construction Company. State of Missouri. Authorized capital stock, $125,000. Proportion represented by property and business in Ohio, $5,190 (in pencil by tax commission). Filed in the office of the Tax Commission of Ohio, at Columbus, Ohio, 7-21-19.

EXHIBIT D.—AFFIDAVIT.

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio, Plaintiff.

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri, Defendant.

Filed, December 6, 1919.

Theodore Gosen, being duly sworn on his oath states

that he is the Secretary and Auditor of the Selden-Breck Construction Company, the defendant above named, and as such is in charge of its books, records, finances and accounts; that he is familiar with the contract between the plaintiff and the defendant in this case, with reference to the furnishing of woodwork and materials for the Library Building, at the University of Michigan, Ann Arbor, Michigan; that the defendant has made payment to, or received credits from the plaintiff in the sum of Ten Thousand Six Hundred Seventy-four Dollars and Sixteen Cents, ($10,674.16), as admitted in the petition filed herein; that said payments or credits may be itemized as follows:

Aug. 17-18	Check Third Natl. Bank, St. Louis, Mo.	$1,100.00
Aug. 19-18	Check Third Natl. Bank, St. Louis, Mo.	1.50
Oct. 24-18	Check Third Natl. Bank, St. Louis, Mo.	500.00
Oct. 31-18	Check Third Natl. Bank, St. Louis, Mo.	10.50
Oct. 21-18	Check Third Natl. Bank, St. Louis, Mo.	1,500.00
Dec. 13-18	Check Third Natl. Bank, St. Louis, Mo.	2,200.00
June 20-19	Check Third Natl. Bank, St. Louis, Mo.	2,790.00
Feb. 7-19	Check Third Natl. Bank, St. Louis, Mo.	2,493.54
Dec. 31-18	Our bill. Mitchell's credit memo. 2-15-19	49.50
Jan. 27-19	Our bill. Mitchell's credit memo. 2-12-19	2.15
Dec. 3-18	Our bill. Mitchell's credit memo. 1-14-19	7.65
Mch. 7-19	Our bill. For cutting returns on ends hand rail,	8.55
Feb. 28-19	Wrt. bill receipt sent Mitchell 3-17-19	3 71
Jan. 31-19	Wrt. bill used as part payment in our remittance of 2-7-19	3.71
Expense	crating doors used as part payment in our remittance of 2-7-19	2.75
		$10,674.16

That each and all of said payments have been made in the form of checks drawn by the Selden-Breck Construction Company, payable to the order of the Robert Mitchell Furniture Company, and drawn upon the Third National Bank of St. Louis Missouri, and each and every one of said checks have been received and accepted by the plaintiff and presented by the plaintiff for payment in the usual course of business through banks, and that each and all of said checks have been paid to the plaintiff or its representatives or endorsees, by the said Third Na-

tional Bank of St. Louis, at and in the City of St. Louis, Missouri.

Further affiant saith not. Theo Gosen.

Subscribed and sworn to before me this 1st day of October, 1919.

My commission expires October 6, 1922.

(seal) Aurelius W. Wenger,

EXHIBIT E.—AFFIDAVIT.

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio, Plaintiff.

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri, Defendant.

Filed December 6, 1919.

H. L. Campbell being duly sworn says that he is the second vice-president of the Selden-Breck Construction Company; that he has charge of the bids which are made by said Company upon work and is familiar with the affairs of said company in that connection; that on the 3rd day of March, 1917, a contract was taken for the construction of the building of the State Bank & Trust Company, Cleveland, Ohio, and that the work upon said building was ended and completed on the 26th day of October, 1918, and that all the officers, agents and employees of the defendant, within the State of Ohio, had been discharged or had left the State of Ohio on or about said date; that the defendant company has not had any contracts for work and has not done any work of any kind within the State of Ohio since the said 26th day of October, 1918; that no bids have been made by the defendant company upon any work in the State of Ohio since the said 26th of October, 1918. Further affiant saith not.

H. L. Campbell.

Sworn to before me and subscribed in my presence by said affiant this 2nd day of October, 1919.

(seal) Aurelius W. Wenger.

Notary Public, City of St. Louis, Missouri.

My term expires October 6, 1922.

EXHIBIT F—AFFIDAVIT.

THE ROBERT MITCHELL FURNITURE COMPANY, a corporation organized and existing under the laws of the State of Ohio, Plaintiff.

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri, Defendant.

Filed December 6, 1919.

Theo. Gosen, being first duly sworn says that he is the Secretary of the defendant company above named; that the Selden-Breck Construction Company defendant herein is engaged in the business of contracting for the erection of large office, hotel, theatre and other large buildings; that since the filing of its application as a foreign corporation in the state of Ohio on October 17, 1910 it has done no business in Ohio except that from time to time it has taken a contract for the construction of some large building in said state and that upon completion of each of said contracts all of its agents and employees have been discharged or have removed from said state; that the last contract for the erection of a building which it has had or transacted within the state of Ohio, was the erection of the Cleveland Bank Building at Cleveland, Ohio, which contract was let on March 18, 1918 and which building was fully completed and finished on October 26, 1918, and that since said date the defendant has transacted no business within the State of Ohio and has had no offices, agents, or employees within the State of Ohio other than one Simeon Nash, the agent named in the ap-

plication in the office of the Secretary of State on October 17, 1910. Further affiant saith not.

Theo Gosen.

Sworn to before me and subscribed in my presence this 21st day of July, 1919.

(seal) Aurelius W. Wenger,
Notary Public, St. Louis, City of Missouri.

EXHIBIT G.

(Filed December 6, 1919.)

To the Secretary of State, Columbus, Ohio:

The Selden-Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri, with its principal office located at The City of St. Louis, in The State of Missouri, desiring to conform to the laws of Ohio, regulating foreign corporations doing business therein, does hereby make the following statement:

FIRST. The amount of its authorized capital stock is One Hundred & Twenty-Five Thousand Dollars.

SECOND. The business or objects of the corporation which it is engaged in carrying on, or which it purposes to engage in or carry on in the State of Ohio is general contracting, building and construction work and any and all things incidental thereto.

THIRD. The principal place of business of said corporation in Ohio is to be located at Ruggery Building, in Columbus, Franklin County.

FOURTH. We hereby appoint Simeon Nash of Columbus, in Franklin County, Ohio, as the person upon whom process may be served in all actions that may be brought against this company in any of the courts of the State, and designate his office at the Ruggery Bldg., in said city, as the principal office of the company in the State of Ohio.

In Witness Whereof, Said corporation has caused its corporate seal to be hereto attached, and this certificate

to be executed by its President and Secretary, this 14th day of October, A. D. 1910.

Selden-Breck Construction Co.
O. G. Selden, President.
Geo. W. Herthel, Secretary.

State of Missouri, City of St. Louis, ss.

O. G. Selden and Geo. W. Herthel being first duly sworn, depose and say that they all did execute and sign the foregoing certificate for and on behalf of said corporation, and that the same is their free act and deed, and is the free act and deed of said Selden Breck Construction Co., of which they are respectively the President and Secretary; that the statements therein are true, and that the seal attached thereto is the genuine seal of said corporation; they further declare on oath, that the charter or certificate of incorporation hereto atached is a true copy of the articles of incorporation or charter of said Selden-Breck Construction Co.

O. G. Selden,
Geo. W. Herthel.

Sworn to before me and subscribed in my presence, this 14th day of October, 1910.

G. Wm. Senn, Notary Public, St. Louis, Mo.
(L. S.) Term expires Dec. 17, 1910.

State of Missouri, City of St. Louis, ss.

I, Charles R. Graves, Clerk of the Circuit Court within and for the City of St. Louis aforesaid, do hereby certify that G. Wm. Senn, whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereof a Notary Public, in and for said City of St. Louis, duly commissioned and qualified, and authorized as such, to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at St. Louis, Mo., this 14th day of October, A. D., 1910.

(L. S.) Chas. R. Graves,
Clerk, Circuit Court.

Columbus, Ohio, October 17, 1910.

The Selden Breck Construction Company.

Gentlemen: I hereby accept the appointment as the representative of your company upon whom process may be served, and agree to the designation of my office, Ruggery Building, Columbus, Ohio, as your principal office in the State of Ohio. Simeon Nash.

State of Ohio, County of Franklin, ss.

Personally appeared before me, the undersigned, a October, A. D. 1910, the above named Simeon Nash, who acknowledged the signing of the foregoing to be his free act and deed for the uses and purposes therein mentioned.

(seal) W. A. Robinson,
Notary Public in and for Franklin County, Ohio.

St. Louis, Missouri, October 14, 1910.

To the Secretary of State, Columbus, Ohio:

The Selden-Breck Contruction Company, a foreign corporation organized and existing under and by virtue of the laws of the state of Missouri, with its principal office located at St. Louis, in the State of Missouri, in compliance with an act of the General Assembly of Ohio, entitled "An act to further supplement Section 148 of the Revised Statutes," passed May 16th, 1894 (as amended May 10th, 1902), requiring a foreign corporation organied for purposes of profit, and owning or using, or which proposes to own or use, a part or all of its capital stock or plant in said State of Ohio, before being permitted to do business, exercise its franchises, or maintain an action therein, under the oath of its president, secretary or other officer, to make and file with the Secretary of State a state ment of facts and pay a certain stipulated fee, hereby makes the following declaration:

First. The authorized capital stock of said corporation is One Hundred and Twenty Five Thousand Dollars ($125,000), divided int oTwelve Hundred and Fifty (1,250) Shares of the par value of One Hundred Dollars ($100) each.

Second. The value of the property owned and used in Ohio, situate at Columbus is One Thousand Dollars ($1,000).

Third. The value of the property of the company owned and used outside of Ohio is One Hundred and Twenty Four Thousand Dollars ($124,000).

Fourth. The proportion of the capital stock of the company represented by property owned and used and by business transacted in Ohio is One-tenth (1/10) (fee on this).

Fifth. The location of its office or offices in Ohio is at The Ruggery Building, Columbus, Ohio.

Sixth. The names and addresses of the officers or agents of the company in charge of its business in Ohio are as follows:

Name of President, O. G. Selden; address, 5139 Westminster Place, St. Louis, Mo.

Name of Secretary, Geo. W. Herthel; address, 3841 Flora Blvd., St. Louis, Mo.

Name of Treasurer, Geo. W. Herthel; address, 3841 Flora Blvd., St. Louis, Mo.

Names and addresses of managers or agents, other than as above enumerated: Daniel Buck, Director, 4448 Forest Park Blvd., St. Louis, Mo.; C. R. Vaughn, Director, 5th and Felix Streets, St. Joseph, Mo.; G. B. Williams, Director, 535 Clara Ave., St. Louis, Mo.

In Witness Whereof, Said Selden Breck Construction Company has caused its corporate seal to be affixed and its corporate name to be hereunto attached by an officer thereof, to-wit: its President, this 14th day of October, A. D. 1910.

Selden Breck Construction Co.,
(Seal.) By O. G. Selden, President.

State of Missouri, County of City of St. Louis, ss.:

O. G. Selden, being duly sworn, deposes and says that he is an officer, to-wit: the President of the Selden Breck Construction Company, that he executed the foregoing statement, in the name and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make such statement and to exe-

cute the same by authority of the corporation, and that the statements therein are rue.

O. G. Selden.

Sworn to before me and subscribed in my presence, this 14th day of October, 1910.

G. Wm. Senn, Notary Public, St. Louis, Mo.
Term expires Dec. 17, 1910.

State of Missouri, City of St. Louis, ss.:

I, Chas. R. Graves, Clerk of the Circuit Court, within and for the aforesaid, do hereby certify that City of St. Louis, G. Wm. Senn, whose name is subscribed to the foregoing acknowledgement as a Notary Public, was at the date thereof a Notary Public in and for said City of St. Louis, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at City of St. Louis this 14th day of October, A. D. 1910.

Chas. R. Graves,
(Seal.) Clerk Circuit Court.

(Certificate Under Section 906, Revised Statutes of the United States.)

United States of America, State of Ohio, Office of the Secretary of State:

I, Harvey C. Smith, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporation of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and

correct, of the Statements of Qualifications of The Selden Breck Construction Company, Form 148d and Form 148c filed in this office on the 17th day of October, 1910.

In Testimony Whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 28th day of November, A. D. 1919.

Harvey C. Smith,
Secretary of State.

(Seal.)

Endorsed on back "Certificate of Secretary of State."

EXHIBIT I—DEPOSITION.
(Filed September 20, 1919.)

ROBERT MITCHELL FURNITURE COMPANY, an Ohio Corporation,
Plaintiff,

vs.

SELDEN BRECK CONSTRUCTION COMPANY, a Missouri Corporation,
Defendant.

Deposition of Witness, Theodore H. Gosen, taken before me, Andrew H. Watson, a Notary Public, within and for the City of St. Louis and State of Missouri pursuant to the annexed notice at the law office of Fred J. Hoffmeister, Esq., Suite 518 Fullerton Building, Southeast corner of Seventh and Pine Streets, in the City of St. Louis and State of Missouri and at the time and place therein specified to be read in evidence in behalf of the Plaintiff in an action pending in the United States District Court of the Southern District of Ohio, Western Division, in which Robert Mitchell Furniture Company is Plaintiff and Selden Breck Construction Company is Defendant; Leo J. Brumleve, Jr., Esq., being present on behalf of Plaintiff and no one appearing on behalf of defendant.

Mr. Gosen: I appear only and solely as an individual in response to a subpoena which has been served on me. I have no authority to act on behalf of the Selden Breck Construction Company in this case, nor do I appear here as an officer of that company and I am not acting in their

behalf therein. I am here solely as the officer before whom these depositions are being taken, directed me.

Theodore H. Gosen,

of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct Examination.

By Mr. Brumleve, Jr.:

Q. Mr. Gosen, I want your full name and address, home address and your business address? A. Theodore H. Gosen, business address 1108 Fullerton Building and home address, 3844 Humphrey Street, St. Louis.

Q. What is your occupation? A. I am secretary of the company and in charge of the books and keep the accounts.

Q. How long have you been secretary of your company? A. I can not recall definitely, but it is the latter part of 1917, I think in October.

Q. Now, what is the character and nature of your company's business?A. General Contractors and Construction Company.

Q. As I understand you, you occupy the position of secretary of that company? A. Yes.

Q. Now, as secretary of the Selden Breck Construction Company, what are your duties? A. It is to keep track of the correspondence and in charge of the minutes of the company.

Q. Now, you also stated you were the bookkeeper of the company? A. Yes.

Q. Now as bookkeeper of the company, what are your duties? A. To keep records of the accounts and paying all bills.

Q. Now, as secretary of the company, you have just stated that it is your duty to take care of the correspondence of the company and also keep the minutes of the company? A. Yes.

Q. You would therefore, be the officer with whom those would be entrusted, would you not? A. Yes.

Q. In other words, there is no other officer who has control of these minutes or control of that correspond-

ence? A. I would not say that because I am under the control of the president of the company.

Q. Do your By-Laws and regulations of your company define what the duties of the secretary are? A. Yes.

Q. And the duties which you have described are those same duties that the By-Laws and regulations provide? A. That is the way I recall it.

Q. If the By-Laws and regulations provide that condition, the Board of Directors could not change them, could they? A. They could. I do not exactly understand what you mean by having control. If you mean I could take them away, do whatever I wanted with them or destroy them, I would not have control of them.

Q. I do not mean that, by the word "Control," they are put in your hands, you prepare them, you have custody of them, have you not? A. Yes.

Q. You have described generally what your company is engaged in; now, I want you to describe in full detail the character of the work, can you do that? A. The greater portion of our work is the construction of office buildings, hotels, warehouses, and commercial buildings.

Q. And the principle office of your company is in St. Louis, Missouri? A. Yes.

Q. It is located in St. Louis, Missouri? A. Yes.

Q. Under what law or in what State is your company incorporated? A. Missouri.

Q. Now, in constructing the work that you have described, I mean your company when I say you, you did it throughout the United States, didn't you? A. Yes.

Q. Did you do it in Canada also? A. No, sir.

Q. So then your company is not limited to St. Louis? A. No.

Q. In fact, is it not so Mr. Gosen that you do more work outside of St. Louis than you do in St. Louis? A. As a whole, yes.

Q. Furthermore your work in a particular State is not continuous work or at least continued from day to day but it is in the sense in particular cities or respective

states, just as long as a particular job takes to finish— A. Yes.

Q. To illustrate what I mean so that there may not be any doubt, you will bid on work in different cities as for instance in Chicago or Toledo or Cleveland or Louisville or Cincinnati, wherever there happens to be a prospective contract to let that is correct, is it? A. When we are interested?

Q. Yes. A. Yes.

Q. So then, you also bid on work in Chicago and also work in Cleveland and you might get a job in Chicago and you might get a job in Cleveland? A. Yes.

Q. And you will be engaged in Chicago just as long as that particular work lasts, that is correct, is it? A. For that particular work or any other work, that we may be engaged in.

Q. Provided you have other work at that time? A. Yes.

Q. Now the same applies to Cleveland or Columbus or Cincinnati, Ohio, does it not? A. Yes.

Q. So then, if you bid on work in Cleveland and you are successful under your bid, get the contract, you may work in Cleveland for a period of several months in succession to complete that particular work? A. Yes.

Q. Then, if there is no other work, you will remove your workman to some other place where you have a contract to do work which may be in Columbus or may be in Chicago or in St. Louis, that is correct? A. That is correct.

Q. Now as a matter of fact, you can never tell at the beginning of a calendar year in just what city you are going to have work, can you? A. No, sir.

Q. Now, in order to do the work of which you have spoken, I want to ask you what you do with reference to getting authority to do that work in a state or different states? A. We will file a report, make out the form whichever the Secretary of State requires with the proper officer of the state and get a permit to do business.

Q. In other words, what do you do as a corporation before entering a particular state? A. Well, I do not know all the requirements because the papers are prepared by our attorney. Different states have different regulations and different requirements.

Q. Now, I want to ask you Mr. Gosen as Secretary of the Defendant company, what time, in other words, what year, did your company enter the State of Ohio to do business in Ohio as a foreign corporation? A. 1910.

Q. What was the occasion of your taking out papers at that time to do business in the State of Ohio? A. I do not recall the exact building, but it was for the reason in order to construct a building.

Q. Can you state whether or not you had ever formally withdrawn from the State of Ohio? A. We have not withdrawn.

Q. During the period then, from the year 1910 to date, including the year 1919, I want to ask you whether or not you have made the usual reports to the Tax Commission of Ohio, or to any other authority in Ohio, that is required by Foreign Corporations before they do business in Ohio? A. I think we did.

Q. And that was so as late as July, 1919, was it not? A. Yes. That is we made a report last year. Now previous years, I think we did, but I would not say definitely.

Q. You have information at hand, have you not, to state that definitely? A. I could refer to the books and state definitely.

Q. Have you got copies of these different reports with you? A. No, I have not.

Q. Why have you not? A. I was advised by counsel that I was not required.

Q. Was that because you were not subpoened as secretary of the company? A. That matter was not gone into.

Mr. Brumleve: Mr. Notary I am going to ask you to issue a subpoena on Mr. Gosen, Secretary of the Selden

Breck Construction Company and ask him to bring with him the records and books of the company including copies of the record made to the Tax Commission of Ohio, Secretary of State in compliance with the Ohio Statute, and also the books, and records showing what work this defendant company has done in Ohio since 1910; what work the company has given bids on.

The request I shall not press at present.

Q. I want to ask you who your attorney is that has given you this advise? A. Buder & Buder.

Q. And where are they located? A. In the Times Building.

Q. In the City of St. Louis? A. City of St. Louis. Mr. Wengler, of Buder & Buder.

Q. Mr. Gosen, how long have you been associated with Selden Breck Construction Company? A. About fourteen years.

Q. Now, during that association do you know of your own knowledge the different work on which you bid and which you had done in the State of Ohio, since 1910? A. No, I do not know.

Q. Well, let us take that period from 1910, to 1919, will you kindly state what work the Selden Breck Construction Company has done in the State of Ohio? A. We did the Deschler Building, Columbus, Ohio, and the Hartman Theater and office building, Columbus, and the State Bank and Trust Company of Cleveland, Ohio. Those are the only ones that I recall off-hand.

Q. Let us now refer to the Deschler Hotel, what time was it, that you did that work to the best of your recollection? A. As I recall it it was about 1914 or 1915.

Q. Now the Hartman building and Theater—A. Theater and office Building.

Q. What time did you do that? A. I can not recall it.

Q. I want your best recollection? A. It was before the Deschler Hotel.

Q. But subsequent to 1910, was it not? A. Yes.

Q. Now with reference to these buildings that you

mentioned in Cleveland, when did you do that? A. In 1917 and in the early part of 1918. I withdraw that. We built it during 1918.

Q. How long did it take you to construct the Deschler Hotel, approximately? A. Approximately a year.

Q. About how long did it take you to construct the Hartman Theater and office building? A. About the same time.

Q. How long did it take you to construct the State Bank and Trust Company Building at Cleveland, Ohio? A. As I recall, about six months.

Q. Now during the year 1916, 1917 and 1918, will you please state what places you put in bids to construct buildings in Ohio. A. I would not know. I do not think I can recall any on account of the fact that it is handled by a different department, entirely by the estimating department of which I have no charge of at all.

Q. Who in the Estimation Department would have that knowledge? A. Probably H. L. Campbell.

Q. He is Vice President of the company? A. He is Second Vice President.

Q. Don't you know Mr. Gosen as Secretary of the Company, that you company bid on the Dixie Terminal Building in Cincinnati, Ohio? A. No, I can not recall it.

Q. All of those matters would go through your hands in correspondence, would they not? A. Not directly.

Q. Well, have you put in any bids for any buildings during the years 1917, 1918 and 1919 in Ohio? A. I can not say.

Q. Well, is there any one else in your estimating department or any bookkeeper or any estimator, who would have knowledge of these different bids? A. Probably, the estimators would know about it. Nearly all of the estimators would know.

Q. Can you refresh your memory as to what bids you put in? A. I could by the records.

Q. Will you do so? A. I will have to refer it to counsel.

Q. I want to know whether you refuse to do it. I am asking you for the reason I want the record to show if you refuse to do it. A. I did not bring them along with me.

Q. But as secretary of the defendant company, that information would be accessible to you, would it not? A. I would not be able to say whether it would or not.

Q. Now Mr. Gosen, you know well enough as secretary of the defendant company that you have the right to examine all the correspondence of the defendant company? A. I may have by a regular proceeding, but you understand that these records are kept by a different department, the estimating department, of which Mr. Campbell is in charge and if he refuses my access to them, I would not have the authority to go through them because he is a higher official.

Q. Do you mean as secretary of this defendant company, you have not got the right to go to the correspondence of this company at any time to see if you can get information? A. It has never been refused me.

Q. If it has not been refused you, as to your access, knowledge and information, now you can get that information, can you not? A. That is the way I feel.

Q. Will you get that information or do you refuse to do so? A. I just said I do not know if I am able to, it may be refused me by the Second Vice President who is an officer.

Q. Have you the minutes and by-laws of your company? A. They are in my charge.

Q. Will you please refer to the regulations and by-laws defining the duties of the Secretary and let us know what those are? A. I have outlined at the beginning of my testimony that I am appearing here as an individual.

Q. Then, if your testimony is correct, you have charge of the correspondence of the company and you would have authority and nobody could stop you from examining any correspondence that the company has,

you know that? A. Higher officials have authority over me.

Q. Is it not a fact that your by-laws and regulations define the duties of the president, and define the duties of every executive officer and that one executive officer can not limit or control the duties of the other executive officers as written down by the by-laws and regulations? A. I can not say that.

Q. Would you mind answering this in order to get your answer definitely, one way or the other, either say you will get the information or will not get the information, will you please go back to your office and see the by-laws and regulations and see what power you have and then return and answer the question one way or the other. A. I refuse.

Q. You refuse to do that? A. Yes.

Q. That is all I want the record to show, so then you refuse to get that information. A. It would be just as well to bring my record.

Q. I want to know if you refuse to give that information, do you refuse to inform this particular court before whom this deposition is going to be read as to whether or not your company submitted any bids during the years 1917, 1918 and 1919 in the State of Ohio? A. I am not in position to give any information on that, that I do not know.

Q. You stated just now that you had charge of the correspondence and that you could ascertain in your exact powers with reference to the by-laws and regulations. Do you refuse to do that, to find out whether or not you could give us that information? A. I would first see if I would be authorized because I am acting as an individual in this case.

Q. That is your own construction? A. Yes, that is my own.

Q. I am asking you to testify from your recollection after examining the papers, after having your recollections refreshed by an examination of these records? A. I am not required to do that.

Q. I will ask you if there is anything to keep you from doing it? A. Except the higher officers of the company.

Q. I am not asking that, I am asking you if there is any way to refresh your recollection and if you are evasive, I want the record to show you are evasive. A. I do not intend to refresh my memory.

Q. So then you refuse? A. Yes.

Q. You know of your own knowledge because it was signed by you that you made a return to the Tax Commission of Ohio, in July, 1919? A. I do not know whether I signed it or not, but a return was made.

Q. What is your best recollection? A. It was signed by whichever officer, the Secretary of State required on the blank. If it required the Secretary's signature, I no doubt signed it.

Q. July, nineteen days ago, is it not and you do not mean to say Mr. Gosen, that your memory is so poor that you can not tell us whether or not you signed the return to the Tax Commissioner of Ohio in July? A. If you want to put it that way, I do, because we make numerous reports to different states which require different officials' signatures and I would not recall if I signed any particular one.

Q. You have that information, have you not, in your office? A. It is in the company's files.

Q. And you can refresh your memory by examining the files, can you not? A. I think I can.

Q. Will you refresh your recollection? A. The same conditions govern as the other answers.

Q. Will you refresh your memory? A. Up to what time?

Q. As of July, 1919, and whether or not you signed a return to the Tax Commission of Ohio? A. No.

Q. You will not? A. No.

Q. Then you refuse? A. Yes.

Q. What is your reason for refusing to give information of that kind? A. Because I do not know that I have the official power to do that.

Q. Now, you also Mr. Gosen, as secretary named Mr. Simeon Nash of Columbus, Ohio, as your agent upon whom service could be had, in suits in Ohio, have you not? A. Yes.

Q. And you have done it in returns of 1918 and in the return of 1919, have you not? A. Yes.

Q. And Mr. Nash has an office in the Ruggery Building, Columbus, Ohio? A. Yes, as I recall it.

Q. Now, it is possible, is it not, since your memory is so poor on some of these things, that you have had other work besides those which you have mentioned in Ohio, during the last five years? A. Yes.

Q. And there may have been other cities too, might there not? A. Yes.

Q. Do you still contemplate doing business in Ohio? A. I can not state for the firm. They will do business anywhere we can get a favorable contract.

Q. That is in Ohio as anywhere else? A. Yes.

Q. Otherwise you would not file your papers in Ohio? A. We would not continue to file our papers there.

Q. Or have an agent there? A. No.

Q. Now likewise Mr. Gosen, your company may have bid on work in Ohio in the years 1917, 1918 and 1919, might it not? A. Yes.

Q. And that is something of which you have not personal knowledge at present, but you refuse to get it, that is right, is it? A. Yes. That is I have not personal knowledge nor is it in my possession, as these records are kept by the head of another department.

Q. When a bid is made by your company who signs that bid? A. There may be different parties, but the greater portion of the time, H. L. Campbell.

Q. When a bid is made who makes the record of the bid? A. It is made in the estimating department under his personal supervision.

Q. Now when a bid is made, is it not reported at the same time to the board of directors? A. No.

Q. How many times does your board meet? A. Monthly.

Q. Is there not some report made at that time of what business has been done and what business has been obtained, what particular work bids have been submitted on? A. The President reports new work although there is no general form of the reports made.

Q. Now when the president makes those reports, you of course are present as secretary? A. I am in the office, that is a greater portion of the time.

Q. And you make minutes of that? A. Yes.

Q. So that when that report is made, it comes to you, does it not? A. Yes.

Q. And that is in your control, that information is under you is it not, and in your possession? A. It is in my possession.

Q. That would disclose what new business you had bid on in Ohio, would it not? A. Yes, new business secured in Ohio but not necessarily what was bid on.

Q. So then, you can get these reports now and ascertain exactly what new business had been secured and what had been done during the nine years your company has done business in Ohio? A. Not necessarily, as I previously stated there is no regular form in the making of reports to the directors. The president may make a report when work is secured and it would not be at a directors meeting.

Q. Don't you make minutes of those reports? A. We keep a record of the reports made in the book of minutes.

Q. That is under your control? A. Yes, in my possession.

Q. And from that you can ascertain exactly what work was done in Ohio, can you not? A. I would not say definitely that the minutes would contain it, but our records of account would show.

Q. Those are in your possession? A. I keep the books.

Q. You can ascertain from your ledger account what was done in Ohio during the last nine years? A. Yes.

Q. Will you refresh your memory from your ledger

and let us have it? A. As an individual I have not access to the reports outside of my office.

Q. Whether it would be as an individual, or whether it would be any other way, you have access, have you not? A. I keep the records in the office.

Q. You have access and you could see them with your own eyes, couldn't you? A. Yes.

Q. Your memory would retain them? A. I imagine it wouldn't be too much.

Q. Well, wouldn't it retain it if you wrote it on a piece of paper? A. Yes.

Q. You could come here if you wanted to and read it? A. Yes.

Q. But you refuse to do so? A. Yes, on advice of counsel.

Q. Why do you refuse to do it? A. On advice of counsel.

Q. Why do you follow the advice of counsel on that when you are under subpoena to testify? A. I would not otherwise know whose advice to follow.

Q. Who is president of the company? A. Daniel Breck.

Q. What jobs have you got in Ohio today? A. None.

Q. Are you positive of that? A. Yes.

Q. Well now, if some bids are in the knowledge of the estimating department only, in view of your previous answers that you do not know because the information is in another department, can you state definitely that there is no work whatsoever over in Ohio today? A. If you want to be as technical as that I can not, but then at the same time when there is a job usually the whole office knows the company secured the contract.

Q. Is it not a fact, Mr. Gosen, that all the information that you can give us about this work is company matter? A. Yes, it is none of my personal matter.

Q. And is it not a fact that you refused to give and which you refuse to refresh your memory on, is com-

pany matter? A. Yes, if I recall, I would give you the information.

Q. Well, there is a means by which you could refresh your memory so as to enlighten your memory that you could recall, is there not? A. Yes.

Q. What distinction is there between that by which you can recall without refreshing your memory and that by which you could recall by having your memory refreshed? A. I do not know there is any distinction.

Q. Why don't you in justice refresh your memory as requested and answer these questions? A. I do not understand why I should take the trouble.

Q. In the interest of justice, that is all? A. I have been told by counsel that I did not need to furnish the record. That is why.

Q. I am not asking you for the record, I am asking you as secretary of the company to refresh your memory from records which are accessible and testify without producing the records? A. I do not have to refresh my memory.

Q. Of course, if you do not want to, if you want to be evasive, all right? A. I am not trying to be evasive, I am trying to tell only the things I know.

Q. You knew you were going to testify here, didn't you? A. Yes.

Q. And you made no effort to refresh your memory for it, did you? A. No.

Q. Even in an action pending in the United States District Court in which you have been called upon to testify as to things that you know. A. I am not familiar with the action at all.

Q. You are secretary of the company? A. I am.

Q. You know the company has been sued? A. We know there is a suit.

Q. You are familiar with the work which has caused this suit. A. Yes, to some extent.

Q. You have written letters on that matter? A. Yes.

Q. And you know that it was an action that was

brought on account of that particular work done, don't you? A. Yes.

Q. You know who represents you as counsel in this case, too, don't you? A. In this case?

Q. Yes. A. I can not say definitely although I think it is Simeon Nash and his company.

Q. Now what other states to your knowledge have you taken out papers in to do business in the state as a foreign corporation? A. Illinois, Nebraska, Texas, Kansas, Iowa; I can not recall all off-hand.

Q. As I understand the work that you have done in these different states is similar to the work you have done in Ohio? A. Yes.

Q. And in those particular states you designated an agent upon whom process could be served upon your company as required by that particular statute? A. Yes, as the statutes required it, we did.

Q. This particular work, takes approximately the same length of time that the work in Ohio, did it not? A. No; it depends upon the size of the job.

Q. It varies according to the particular size of the building that you are constructing? A. Yes, and labor conditions and items of that kind.

Q. And you are still open to do work in Ohio, are yo unot? A. As far as I know, yes.

Q. And you are looking for prospects in Ohio too, are you not? A. Well, I can not say we are just now.

Q. I mean you are open for prospects in Ohio? A. Sure.

Q. And watching for the opportunity to bid on work and construct work in Ohio? A. I would not say that we are watching for it. If we knew of a job that was contemplated we would possibly use some efforts to secure it.

Q. Business in general in your line of work, that is the erection of office buildings and hotels and large structures has been quite dull within the last six months, has it not? A. Not exactly in the last six months, but previous to that, for about a year previous to that.

Q. And also say about a year from now. A. In the last six months there has been quite a number of projects on the market.

Q. What work have you commenced within the last six months? A. We have started two buildings, one in Wichita Falls, Texas and one in Omaha, Nebraska.

Q. That is all? A. Yes.

Q. So then, business has been dull as far as your company is concerned throughout the country within the last six months? A. I would not exactly say that because we have quite a number of prospective jobs although we have not closed the usual amount of business in the past six months that we have been doing heretofore.

Q. Of course, if that is so, it is below normal then? A. Yes.

Q. I want to ask you again as secretary of the company, and I want you to take your time to answer the question, what work in Ohio have you bid on within the last six months? A. As I stated before I am not testifying as secretary of the company—

Q. I am asking you of your own knowledge. A. I do not know of any jobs we did there.

Q. You do not mean by that, if you stop at that, that you can not recall some job? A. My honest opinion is, we did not put in any bids but I would not say definitely, because it does not come under my supervision.

Q. Have you any man traveling in Ohio on business? A. Not now.

Q. Did you have any man traveling in Ohio on business? A. Not that I know of, although it might be possible, but not that I know of.

Q. When you say it might be possible, what do you mean? A. We often have representatives out looking for business.

Q. Now, is there anything else that your company has done in Ohio in its work there in securing bids for doing work, which I have not asked you about? A. I

can not say there are. How do you mean? I can not say there was.

Q. Are you familiar with the Bentley Company of Toledo? A. I am not; I have heard of them.

Q. They are one of your competitors, are they not? A. Yes.

Q. The same as the Fuller Company, is one of your competitors? A. In one sense, we meet in competition on some of our jobs, not always.

Q. You do not know whether or not you bid on the Dixie Terminal Hotel in Cincinnati? A. No, I do not know.

Q. Your records would disclose that? A. I imagine they would. They are not kept by me, but I imagine they would.

Q. And you refuse to get that information to verify whether or not they did? A. The records are not in my possession.

Q. You are secretary of the company? A. Yes.

Q. Have you ever been in Ohio? A. No.

Q. You never went there on company's business? A. No.

Theo. H. Gosen.

Subscribed and sworn to before me this 19th day of September, A. D. 1919.

(Seal.) Andrew H. Watson,
Notary Public within and for the City of
St. Louis and State of Missouri.

State of Ohio, Hamilton County, ss:

Leo J. Brumleve, Jr., being first duly sworn says that on August 11th, 1919, he attached notice to take depositions of Theodore H. Gosen and H. L. Campbell at 518 Fullerton Building, St. Louis, Mo., was duly served by him on the firm of Williams & Nash, the attorneys of record of the Selden Breck Construction Company in the case pending in the U. S. District Court for the Southern District of Ohio, Western Division, No. 2779 on August 11th, 1919, by mail, addressing such notice to

Messrs. Williams & Nash, Ruggery Building, Columbus, Ohio, and that receipt of said notice was duly acknowledged by Mr. Simeon Nash by letter dated August 12th, 1919, and that said notice was returned therein.

Affiant further says that he thereupon directed Mr. Andrew H. Watson to serve the notice on the defendant, the Selden Breck Construction Company at St. Louis, Mo.

And further affiant sayeth not.

Leo Brumleve.

Sworn to before me and subscribed in my presence this 27th day of August, A. D. 1919.

(Seal.) H. J. Subemhater,
Notary Public in and for Hamilton County, Ohio.

EXHIBIT No. 2.

Affidavit of Mark L. Mitchell.

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiffs,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Missouri,

Defendants.

State of Ohio, Hamilton County, ss:

Mark L. Mitchell, being first duly sworn, says that he resides in the City of Cincinnati, State of Ohio; that he is the Secretary and Treasurer of the plaintiff company, The Robert Mitchell Furniture Company; that The Robert Mitchell Furniture Company is a corporation organized under the laws of the State of Ohio with its principal place of business in the city of Cincinnati, Ohio; that it is engaged in the manufacture of cabinet work

and wood interior trim; that the defendant is a corporation organized and existing under the laws of the State of Missouri; that in 1910 it entered the state of Ohio as a foreign corporation and has subsequently thereto filed its annual reports as a foreign corporation up to and including the year 1919; that on information and belief affiant says that at the time the defendant entered the state to do business therein as a foreign corporation it designated Simeon Nash of the Ruggery Building, Columbus, Ohio, as the agent of the defendant upon whom service of summons could be had in compliance with Section 179 of the General Code; that on or about the 3rd day of January, 1917, the plaintiff entered into a written contract with the defendant, the said plaintiff executing the contract at Cincinnati, Ohio, under and by virtue of the terms of which plaintiff agreed to provide all materials and perform all of the work in Cincinnati, Ohio, delivery f. o. b. cars Ann Arbor, Mich., of the interior woodwork for the Library Bldg. of the University of Michigan, for which the defendant agreed to pay a certain stipulated amount, nothing being said in the contract as to the place of payment but all payments being made by check direct to The Robert Mitchell Furniture Company at its office in Cincinnati, Ohio.

Affiant further says that The Selden Breck Construction Company is a corporation engaged in the construction of office buildings, hotels, warehouses, commercial buildings, etc., throughout the U. S., and as such construction company entered the state of Ohio as a foreign corporation to further its work in the year 1910, and that as such foreign corporation continuously filed its annual reports as provided by the Ohio law. Certified copies duly authenticated by the Secretary of State for the years 1918 and 1919 are attached hereto; that the said Selden Breck Construction Company continuously thereafter from time to time entered into competitive bids with other companies engaged in similar work in Ohio, and that during the same time the said company constructed the hotel known as the Deschler Hotel at

Columbus, Ohio, the Hartman Theater & Office Building at Columbus, Ohio, the State Bank & Trust Company at Cleveland, Ohio, all of which construction took numerous months to complete, and affiant further says that he believes that the said company constructed other buildings during said time of which he has no knowledge.

And further affiant sayeth not.

Mark L. Mitchell,

Sworn to before me and subscribed in my presence this 28th day of November, A. D. 1919.

(Seal.) Leo J. Brumleve, Jr.,
Notary Public in and for Hamilton County, Ohio.

(The exhibits referred to in the affidavit of Mark L. Mitchell are authenticated copies of the reports of The Selden Breck Construction Company to the Tax Commission of Ohio for the years 1918 and 1919 filed in July and are exact duplicates that are attached to the affidavit of Theo. Gosen and Marked Exhibit C.)

MOTION OF DEFENDANT FOR REHEARING OF MOTION OF DEFENDANT TO QUASH ISSUING AND SERVICE OF ALIAS SUMMONS IN THE DISTRICT COURT.

Filed February 21, 1920.

THE ROBERT MITCHELL FURNITURE COMPANY, Plaintiff,

No. 2779. vs.

SELDEN-BRECK CONSTRUCTION COMPANY, a corporation, Defendant.

Now comes the defendant, above named, and not in any wise entering its appearance herein, but appearing solely and only for the purposes of this motion, and for the purpose of renewing its protest against the jurisdiction of

this court over it, and moves the court that the court vacate its former order heretofore made herein on the 17th day of December, 1919, overruling the motion of the defendant filed herein on the 19th day of July, 1919, wherein the defendant asked that the issuing and service of the alias summons out of the District Court be vacated, and quashed, and that a rehearing of said motion be granted, all for the reasons assigned in said motion, and further for the reason that since the making of said order of December 17th, 1919, the decision of the Suupreme Court has been rendered in the case of *Chipman, Limited*, v. *The Thomas B. Jeffery Company.* (Decided January 19th, 1920), and that the same bears upon the questions raised by said motion.

Selden-Breck Construction Company,
By Williams & Nash,
Its Attorney.

ENTRY GRANTING MOTION TO QUASH ALIAS SUMMONS.

Filed March 15, 1920.

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

This cause having come on to be heard on the application of the defendant for a re-hearing of the motion to quash the service of alias summons issued by the District Court of the U. S., Southern District of Ohio, Western Division, the case of *Chipman, Limited*, v. *The*

Thomas B. Jeffrey Company having been decided by the Supreme Court since the former ruling of this court upon said motion, the court finds that the said application is well taken and the same is hereby granted.

Thereupon said motion to quash said alias summons was submitted to the court upon the evidence set forth in the bill of exceptions granted and filed herein on December 23, 1919, no other evidence being offered, and the court having heard the arguments of counsel and upon due re-consideration and deliberation, finds that the motion of the defendant to quash the service of alias summons issued by the District Court of the United States Southern District of Ohio, Western Division, is well taken and that the same should be sustained.

Wherefore, it is ordered that so much of the entry of December 17th, 1919, as overrules the said motion to quash said alias summons issued by the District Court of the U. S. be vacated and set aside, and that the said motion be, and the same is in all respects granted and the service of said alias summons herein be, and the same is hereby vacated and set aside, and the plaintiff having indicated that it is not possible for the plaintiff to secure service in any other manner or form than that made herein, plaintiff's petition is hereby dismissed for lack of jurisdiction over the person of the defendant.

To all of which judgments, orders and decree of the court plaintiff by its counsel excepts.

Peck, J.

BILL OF EXCEPTIONS.

(Allowed March 15, 1920; Filed March 15, 1920.)

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

Be It Remembered That on the hearing of the above entitled cause in the above named court before the Honorable John W. Peck, District Judge, sitting at Cincinnati, Ohio, in the Western Division of the Southern District of Ohio, on the 13th day of March, 1920, upon the motion of the defendant for a re-hearing of the motion of defendant to quash the issuing and service of alias summons in the District Court of the U. S. Southern District of Ohio, Western Division, said motion for re-hearing having been filed on Feb. 21, 1920, the following proceedings were had.

Present on behalf of plaintiff—Leo J. Brumleve, Jr.

Present on behalf of defendant—Simeon Nash.

After arguments of counsel and upon due deliberation, the Court granted said motion for re-hearing, to which exception was made by counsel for the plaintiff.

Thereupon the court proceeded to re-consider and rehear the said motion to quash the service of alias summons issued out of the District Court of the U. S., Southern District of Ohio, Western Division, upon the same testimony, deposition, affidavits and exhibits as heretofore offered in evidence by the respective parties hereto, all as set forth in the bill of exceptions granted herein on the 23rd day of December, 1919, and filed herein on the 23rd day of December, 1919, no other evidence

being offered, and the said bill of exceptions being a part of the record of this case is referred to, attached to, and made a part of this bill of exceptions.

Thereafter on the 15th day of March, 1920, the court ordered and decreed as is shown by the decree of the court upon said motions entered of record in this cause on the 15th day of March, 1920, to which judgment and decree of the court in granting and sustaining the motion of the defendant to quash the service of alias summons issued out of the District Court of the U. S., Southern District of Ohio, Western Division, the plaintiff excepted.

And now in furtherance of justice and that right may be done the plaintiff, the Robert Mitchell Furniture Company, tenders and presents this as its bill of exceptions upon the hearing of the motion to quash the service of alias summons issued out of the District Court of the U. S. for the Southern District of Ohio Western Division and prays that the same may be settled, allowed, signed and sealed by the court and made a part of the record and the same is accordingly done this 15th day of March, 1920.

In Witness Whereof the Judge of said court has hereunto attached his official signature as such this 15th day of March, 1920, and during the term of said court at which said decree was made and within the time allowed by the court for preparing and filing this Bill of Particulars.

Peck,
Judge of the U. S. District Court, Southern
District of Ohio, Western Division.

PETITION FOR WRIT OF ERROR.

(Filed March 31, 1920.)

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

Now comes the above named plaintiff, The Robert Mitchell Furniture Co., a corporation organized and existing under the laws of the State of Ohio, by its attorney and says,

That this cause was commenced in the Court of Common Pleas of Hamilton County, Ohio.

That the defendant filed in said court a petition and bond for the removal of said cause to this court, a copy of the record in said cause in said state court certified by the clerk of said state court under the seal of the said state court was filed in this court on the 20th day of June, 1919.

That thereafter and on the 17th day of December, 1919, this court made an order in this cause granting the defendant's motion to vacate and set aside the service of alias summons herein upon the defendant that was issued out of the Court of Common Pleas of Hamilton County, Ohio, and overruling the defendant's motion to vacate and set aside the service of alias summons herein upon the defendant that was issued out of this court; that thereafter on a motion for a re-hearing filed by the defendant and on the 15th day of March, 1920, this court made an order in this cause vacating and setting aside so much of the entry of the 17th day of December, 1919, as overrules the said motion to quash said alias sum-

mons issued out of this court and granting the said motion in all respects and vacating and setting aside the service of alias summons herein upon the defendant issued out of this court and dismissing the plaintiff's petition for lack of jurisdiction over the person of the defendant.

That in this cause the jurisdiction of the court was and is in issue and the only question tried and decided by this court was the question of the jurisdiction of this court.

That this court in and by said order and judgment determined and decided in favor of the defendant and against the plaintiff that the service of the alias summons herein was not legal and valid service of the summons on the defendant, and that the said summons and said service thereof should be vacated and set aside and that the court had no jurisdiction of the person of the defendant.

That the plaintiff is aggrieved by the said decisions of this court.

That the plaintiff further says that in said order and judgment vacating and setting aside the service of the alias summons and dismissing the petition herein for lack of jurisdiction of the person of the defendant, errors were committed on the question of jurisdiction of the court to the prejudice and great damage of the plaintiff all of which will more in detail appear in the record of this cause and from the Assignment of Errors which is presented and filed with this petition.

Wherefore this plaintiff considering itself aggrieved, prays that a Writ of Error may be allowed and may issue in its behalf to the Supreme Court of the United States to the end that the said order, ruling, decision and judgment may be reviewed by the Supreme Court of the United States upon the question of the jurisdiction of the court hereby determined, and that the errors so complained of may be corrected, and that a transcript of the record, proceedings and papers in this cause, duly

authenticated, may be sent to said Supreme Court of the United States. Dated Cincinnati, Ohio, this 30th day of March, 1920.

Leo Brumleve, Jr.,
Attorney for the plaintiff.

The foregoing petition for Writ of Error was duly presented to me this 31 day of March, 1920 before the allowance of the Writ of Error to the Supreme Court of the United States in said cause.

Peck,
U. S. District Judge for the Southern District of Ohio.

ASSIGNMENT OF ERRORS.

(Filed March 31, 1920.)

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

Now comes the above named plaintiff, The Robert Mitchell Furniture Company, a corporation organized and existing under the laws of the State of Ohio by its counsel and in connection with its petition for a Writ of Error to the Supreme Court of the United States assigns error in the record and proceeding in the above entitled cause as follows:

1. That the said court erred in granting the defendant's motion to vacate and set aside the service of alias summons issued out of the Court of Common Pleas of Hamilton County, Ohio.

2. That the court erred in vacating and setting aside so much of its order of December 17th, 1919, as overrules the said motion to quash said alias summons issued

herein out of this court and in granting the defendant's motion to vacate and set aside the service of alias summons issued out of this court on said defendant.

3. That the court erred in adjudging the service of the alias summons herein insufficient to confer jurisdiction.

4. That the court erred in dismissing the petition herein for lack of jurisdiction of the person of the defendant.

5. That the court erred in entering the order of December 17th, 1919, vacating and setting aside the service of the summons issued out of the Court of Common Pleas of Hamilton County, Ohio.

6. That the court erred in entering the order of the 15th day of March, 1920, vacating and setting aside the service of summons issued out of this court and dismissing the action for the reasons aforesaid.

7. That the said court erred in not holding that the service of the alias summons herein was proper and in all respects valid.

8. That the court erred in not holding that it had jurisdiction of the person of the defendant.

Dated Cincinnati, Ohio, this 30th day of March, 1920.

Leo Brumleve, Jr.,
Attorney for Plaintiff.

The foregoing Assignment of Errors was duly presented to me this 31 day of March, 1920, before the allowance of the Writ of Error to the Supreme Court of the United States in this cause.

Peck,
United States District Judge for the
Southern District of Ohio.

ALLOWANCE OF WRIT OF ERROR.

(Filed March 31, 1920.)

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

This day came The Robert Mitchell Furniture Company, a corporation and presented a petition for the allowance of a Writ of Error and Assignments of Error accompanying the same, which petition upon consideration of the court is hereby allowed upon the filing of a bond in the sum of $250 with good and sufficient authority to be approved by the court.

Peck, J.

BOND.

(Filed March 31, 1920.)

KNOW ALL MEN BY THESE PRESENTS, that we-"The Robert Mitchell Furniture Company, a corporation of the City of Cincinnati and State of Ohio, as principal and The Fidelity & Deposit Company of Maryland as surety, are held and firmly bound unto the above named the Selden-Breck Construction Company in the sum of Two Hundred and Fifty ($250) Dollars to be paid to the said the Selden-Breck Construction Company for the payment of which well and truly to be made that we bind ourselves and each of our successors and assigns jointly and severally firm by these presents.

Sealed with our seals and dated the 31st day of March, 1920.

Whereas, the above named The Robert Mitchell Furniture Company has prosecuted a Writ of Error from the United States Supreme Court to reverse the order vacating and setting aside the service of summons and the judgment of dismissal dated the 15th day of March, 1920, rendered in the above entitled suit in the District Court of the United States for the Southern Disrict of Ohio.

Now, Therefore, the consideration of this application is such that if the above named The Robert Mitchell Furniture Company, a corporation, shall prosecute its writ to vacate and answer all damages and cost, if it fail to make its plea good, then this application shall be void, otherwise the same shall be and remain in full force and effect.

The Robert Mitchell Furniture Co.,
By Robert Mitchell, Pres.
Fidelity & Deposit Co, of Md.,
By Paul M. Millikin, Atty. in Fact.

Approved by Peck
District Judge for the U. S. District Court
for the Southern District of Ohio.

CERTIFICATE.

(Filed March 31, 1920.)

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff.

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

An order having been entered herein on December

17th, 1919, vacating and setting aside the service of the summons issued out of the Court of Common Pleas of Hamilton County, Ohio, and an order having been entered herein on the 15th day of March, 1920, vacating and setting aside so much of the entry of December 17th, 1919, as overrules the said motion to quash said alias summons issued by this court herein and granting the motion to quash said alias summons in all respects and dismissing the complaint herein for lack of jurisdiction of the person of the defendant, now, therefore, this court, in pursuance of the Third Paragraph of the Fifth Section of the Act of Congress, approved March 3rd, 1891, hereby certifies to the Supreme Court of the United States, that in the above entitled cause, the jurisdiction of this court of the person of the defendant was in issue and was decided adversely to the plaintiff and that by reason thereof, and not otherwise, the orders of December 17th, 1919, and March 15th, 1920, and the judgment of dismissal of March 15th, 1920, shown in the record herein were entered; that pursuant to said Act above mentioned, the following questions are hereby certified to the Supreme Court:

1. Whether in the service of the summons as shown by the record herein upon Simeon Nash, this court acquired jurisdiction of the person of the defendant.

2. Whether upon the facts shown by the record, the court acquired jurisdiction of the person of the defendant.

3. Whether the service of alias summons herein upon said Simeon Nash was a legal service of process upon the defendant so as to vest in this court jurisdiction herein of the person of the defendant.

Dated Cincinnati, Ohio, this 31 day of March, 1920.

Peck,
United States District Judge for
the Southern District of Ohio.

WRIT OF ERROR.

United States of America, ss:

The President of the United States,

To the Honorable the Judges of the District Court of the United States for the Southern District of Ohio

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The Robert Mitchell Furniture Company, a corporation organized and existing under the laws of the State of Ohio, plaintiff in error, and the Selden-Breck Construction Company, a corporation organized and existing under the laws of the State of Missouri, defendant in error a manifest error hath happened, to the great damage of the said The Robert Mitchell Furniture Company, plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 31st day of March, in the year of our Lord one thousand nine hundred and twenty (1920).

(Seal.) B. E. Dilley,
Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by
J. W. Peck,
U. S. District Judge for the U. S. District Court for the Southern District of Ohio.

CITATION.

United States of America, ss:

To the Selden Breck Construction Company, a corporation,

Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio wherein The Robert Mitchell Furniture Company, a corporation organized and existing under the laws of the State of Ohio, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Peck, Judge of the District Court of the United States for the Southern District of Ohio, this 31st day of March, in the year of our Lord one thousand nine hundred and twenty (1920).

Peck,
Judge of the U. S. District Court for the Southern District of Ohio.

STIPULATION FOR TRANSCRIPT.

(Filed April 5, 1920.)

THE ROBERT MITCHELL FURNITURE CO., a corporation organized and existing under the laws of the State of Ohio,

Plaintiff,

No. 2779. vs.

SELDEN BRECK CONSTRUCTION CO., a corporation organized and existing under the laws of the State of Missouri,

Defendant.

It is hereby stipulated and agreed by and between the plaintiff, The Robert Mitchell Furniture Company, a corporation, by its attorney and the Selden Breck Construction Company, a corporation, by its attorney Simeon Nash, appearing specially and only under its motions to quash alias summons, and for no other purpose, that a transcript of the record in the above entitled matter in error to the Supreme Court shall consist of the following:

1. Transcript of the record of the Common Pleas Court of Hamilton County, Ohio.
2. Praecipe for alias summons.
3. Alias summons issued.
4. Return of alias summons.
5. Motion of defendant to quash service of alias summons in State Court.
6. Motion of defendant to quash service of alias summons in the District Court of the United States.
7. Deposition of Theodore Gosen filed on behalf of plaintiff and attached to Bill of Exceptions and marked as Exhibit 1.
8. Affidavit of Mark L. Mitchell filed and attached to the Bill of Exceptions and marked as Exhibit 2.

9. Affidavit of George B. Williams filed and attached to the Bill of Exceptions and marked Exhibit A.

10. Affidavit of Theodore Gosen attached to the Bill of Exceptions and marked Exhibit B.

11. Affidavit of Theodore Gosen attached to the Bill of Exceptions and marked Exhibit C.

12. Affidavit of Theodore Gosen attached to the Bill of Exceptions and filed, marked Exhibit D.

13. Affidavit of H. L. Campbell filed and attached to the Bill of Exceptions and marked Exhibit E.

14. Affidavit of Theodore Gosen filed and attached to the Bill of Exceptions and marked Exhibit F.

15. Certificate of the Secretary of the State of Ohio of statement filed by the Selden Breck Construction Company filed and attached to the Bill of Exceptions and marked Exhibit G.

16. Opinion of Hon. John W. Peck, District Judge.

17. Order granting motion to quash service of alias summons issued by the Court of Common Pleas of Hamilton County, Ohio, and overruling the motion to quash service of alias summons issued by the District Court of the United States for the Southern District of Ohio, Western Division.

18. Notice of filing of Bill of Exceptions.

19. Order granting permission to use original affidavits, deposition and certificate of the Secretary of the State of Ohio for the purpose of attaching same as Exhibits to the Bill of Exceptions.

20. Bill of Exceptions allowed December 23, 1919.

21. Motion of defendant for re-hearing of motion of defendant to quash service of alias summons in the District Court.

22. Order granting motion to quash alias summons issued by the United States District Court for the Southern District of Ohio and dismissing petition of plaintiff.

23. Bill of Exceptions allowed March 15, 1920.

24. Petition for writ of error.

25. Assignment of errors.

26. Order allowing writ of error.
27. Bond.
28. Certificate.
29. Writ of Error.
30. Citation.
31. Stipulation as to Contents of Record.

Leo J. Brumleve, Jr.,
Attorney for plaintiff.

Simeon Nash,
Attorney for Selden-Breck Construction Company appearing specially and only under its motions to quash alias summons and for no other purpose.

THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division, ss:

I, B. E. Dilley, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing pages, numbered from 1 to 96, inclusive, contain true and correct transcript of those portions of the record and proceedings in the therein entitled cause, indicated in the Stipulation for Record filed therein on April 5, 1920, as the same appear on file and of record in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 13th day of May, A. D. 1920.

[Seal United States District Court, Southern Dist. of Ohio.]

B. E. DILLEY,
Clerk,
By HARRY F. RABE,
Deputy.

WALTER A. DE CAMP,
Of Counsel for Plaintiff in Error.

Endorsed on cover: File No. 27,685. S. Ohio D. C. U. S. Term No. 930. The Robert Mitchell Furniture Company, plaintiff in error, vs. Selden Breck Construction Company. Filed May 15th, 1920. File No. 27,685.

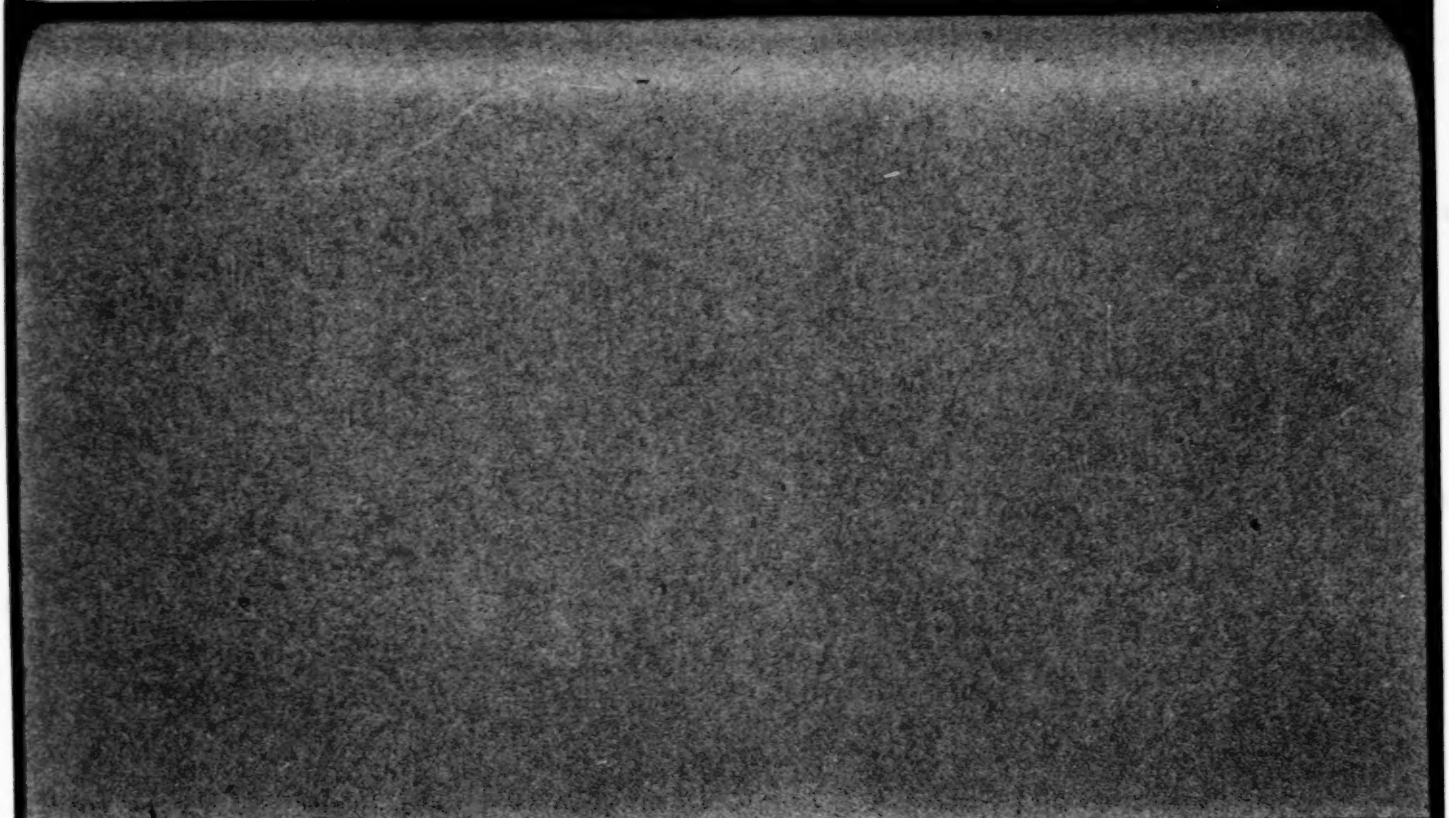
[redacted]

Supreme Court of the United States

[redacted]

[redacted]

[redacted]



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Supreme Court of the United States

October Term, 1920.

THE ROBERT MITCHELL FURNITURE COMPANY,
Plaintiff in Error,

No. 340. *vs.*

SELDEN BRECK CONSTRUCTION COMPANY,
Defendant in Error.

Brief on Behalf of Plaintiff in Error.

STATEMENT OF CASE.

This action was brought by the plaintiff in error (hereinafter referred to as the plaintiff) against the defendant in error (hereinafter referred to as the defendant) to recover damages for breach of a certain contract which is in writing and which appears in the record on page 37.

The plaintiff is an Ohio corporation with its principal place of business located at Cincinnati, Ohio. The defendant is a Missouri corporation with its principal place of business located at St. Louis, Mo.

The action was originally commenced in the Common Pleas Court of Hamilton County, State of Ohio on April 5, 1919. The defendant caused the action to be removed to the United States District Court for the Southern District of Ohio, Western Division on June 20, 1919. A praecipe for alias summons against the defendant was

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filed by the plaintiff in the Clerk's Office of the United States District Court on June 23, 1919, directing the clerk to issue summons against the defendant by serving Simeon Nash at Columbus, Ohio, the agent designated by the defendant upon whom process can be had against it under the statutes of Ohio. This service was made by the Marshall on June 24th, 1919. The defendant filed a motion to quash the service of summons in the state court and a motion to quash the alias summons in the District Court on July 19, 1919. (Pages 17 and 19.) The court rendered its opinion on December 11, 1919, granting the motion to quash the service of summons in the state court and overruling the motion to quash the service of the alias summons in the District Court. (Page 22.) An entry in accordance with the judgment was made on December 17, 1919. (Page 24.) Immediately after the decision of this Honorable Court in the case of *Chipman, Ltd.*, v. *The Thomas B. Jeffry Company*, on January 19, 1920 (250 U. S., 373), the defendant filed an application for a rehearing of the aforesaid motions (page 80) which was granted. The District Court thereupon granted the motion to quash the service of alias summons in the District Court on March 15, 1920, solely on the authority of the decision of this Honorable Court (page 81). The only question therefore presented in this case is whether the facts come wholly within the ruling of this Honorable Court in the case of *Chipman, Ltd.*, v. *The Thomas B. Jeffrey Company*. We respectfully submit that the two cases are manifestly distinguishable and that the service in the instant case is a valid one.

The plaintiff upon the certificate of the District Judge (page 90) by writ of error brings directly to this court for review the said order and judgment of the District Court. (*Chicago Board of Trade* v. *Hammond Elevator*

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Company, 198 U. S., 424.) In his certificate, the District Judge certified to this court the following questions, which sufficiently present the question at issue, namely:

1. Whether in the service of the summons as shown by the record herein upon Simeon Nash this court acquired jurisdiction of the person of the defendant.

2. Whether upon the facts shown by the record, the court acquired jurisdiction of the person of the defendant.

3. Whether the service of alias summons herein upon said Simeon Nash was a legal service of process upon the defendant so as to vest in this court jurisdiction herein of the person of the defendant.

Specification of the Errors Relied Upon.

While there are eight assignments of error set forth (page 87) a single question is raised, to-wit: Whether the learned court below erred in vacating and setting aside the service of summons and dismissing the action for lack of jurisdiction of the person of the defendant. This is sufficiently raised by the fifth and sixth assignments of error which read:

5. That the court erred in entering the order of December 17, 1919, vacating and setting aside the service of summons issued out of the Court of Common Pleas of Hamilton County, Ohio.

6. The court erred in entering the order of the 15th day of March, 1920, vacating and setting aside the service of summons issued out of this court and dismissing the action for the reasons aforesaid.

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The Facts.

The plaintiff, an Ohio corporation, entered into a contract with the defendant, a Missouri corporation, by virtue of which plaintiff agreed to manufacture and deliver F. O. B. cars Ann Arbor, Michigan, all the interior cabinet woodwork for the library building of the University of Michigan.

The plaintiff company was engaged in the manufacture of cabinet and interior woodwork with its factories located at Cincinnati, Ohio. The defendant company is a general contracting company and is engaged in constructing and erecting office buildings, hotels, warehouses and commercial buildings throughout the United States and in Canada. The record discloses that the contract was signed by the plaintiff in Cincinnati, Ohio; that the work was manufactured in Cincinnati, Ohio, and that all payments were made to the plaintiff at Cincinnati, Ohio (page 78).

The record discloses that the defendant company entered the State of Ohio to do business therein in the year 1910, at which time it made application to the Secretary of State for a certificate to do so in compliance with Sections 178 and 179 of the General Code of Ohio (page 56). In a statement filed at that time, to-wit: the 14th day of October, 1910, the defendant company appointed Simeon Nash of Columbus, Ohio, as the person upon whom process may be served in all actions that may be brought against it in any of the courts of the state. Thereafter the company yearly filed its annual report in accordance with Sections 5499 to 5501 of the General Code. (These Sections are herewith printed in full.)

Copies of these reports for the years 1918 and 1919

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appear in the Record on pages 44 and 49. These were filed respectively on July 16, 1918, and July 21, 1919, the latter being three months after the filing of the petition in this cause and about a month after the service of alias summons that was issued out of the United States District Court.

It will be noted by Item 14 of these reports that the nature and kind of business transacted by the defendant company in Ohio is general contracting and building construction, that by Item 18 of the report of 1918, the amount of business transacted in Ohio during the twelve months ending June 30, 1918, was $31,174 and that by Item 18 of the Report for the year 1919 the amount of business transacted in Ohio during the twelve months ending June 30, 1919, was $10,544.91. It will also be noted in the reports of these two latter years by Item 5 that the name of its agent is Simeon Nash with an office at Columbus, Ohio.

The record further discloses that the defendant company is in competition with other construction companies in Ohio in the erection of office buildings, hotels, warehouses and other commercial buildings and in this competition was successful during these nine years preceding the commencement of this action in erecting divers buildings throughout the state, among which were the Deschler Hotel, Columbus, Ohio, The Hartman Theater and Office Building, Columbus, Ohio, and the State Bank & Trust Company of Cleveland, Ohio (page 66). These were the only ones that the Secretary of the defendant company could recall at the time when his deposition was taken and he absolutely refused to refresh his memory as to other work, when requested to do so by counsel. He admitted, however, when pressed, that in addition to this work, it is possible that the company constructed

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other buildings during the five years preceding the date when the deposition was taken in August, 1919 (page 71). There is nothing in the record to show that the buildings enumerated were the only ones constructed by the defendant in the state. The construction of these buildings alone consumed several years, the last work being done on the State Bank & Trust Company building in Cleveland, Ohio, on the 26th day of October, 1918.

We desire to call particular attention to the deposition of the Secretary of the defendant company, Mr. Theodore Gosen, which appears on page 61 of the Record. It will be noted that the witness was evasive and non-committal and deliberately refused to furnish the data showing the extent of the defendant's operations in Ohio after the year 1910. There was enough obtained, however, from this witness to show that this defendant company entered Ohio to do business therein, in the construction of buildings in competition with other construction companies and to obtain all the business that it could and that the defendant company was still engaged in such efforts at the time this suit was filed and at the time when the service in question was made on its agent at Columbus. We refer this Honorable Court to pages 71 and 73 of the Record, particularly to the witness' reply that the defendant company is still open to do work in Ohio, is looking for prospects and is watching for the opportunity to bid on work and to construct work in this state. This is evident from the fact that it has always considered itself in Ohio in competition with others in the state, as is shown by its report which it filed with the Secretary of State about a month after the service of summons upon its agent at Columbus, Ohio.

These facts we submit establish clearly that the com-

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pany was engaged in business in Ohio at the time the suit was filed and at the time of the summons upon the agent of the defendant company.

The Law.

We feel that it is not necessary to review the many decisions of this Honorable Court determining the law relative to the jurisdiction of the person of a foreign corporation. It has been definitely decided that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation at the time was transacting business in that district. The case of *Chipman, Ltd.*, v. *The Thomas B. Jeffrey Company* merely reiterated this well defined principle and accordingly, added nothing new except to hold that the unrevoked designation of a statutory agent did not give the defendant constructive presence in this state so as to subject it to process when it did not transact business within the state. The facts in that case clearly establish that the defendant company ceased to do business several years prior to the attempted service. The principal question therefore presented is whether the facts in the instant case show that the defendant company at the time of the suit and service of process was engaged in doing business in Ohio.

The difficulty lies in the definition of the term "what is doing business." No all embracing rule has yet been laid down as to what constitutes the manner of doing business by a foreign corporation to subject it to process in a given jurisdiction. The action of the courts in this respect is very similar to their action in defining the mean-

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ing of "fraud." Each case must be determined by its own peculiar facts. It has been held that isolated or independent transactions or that are merely incidentally necessary to the business of a foreign corporation do not constitute doing business so as to subject the corporation to process within the state but where there is a repetition of the transactions so that the territory of the local state is made the basis of the operations of the business of the corporation, such transactions constitute doing business. In a general way, it has been said by this Honorable Court on repeated occasions that the business must be such in character and extent as to warrant the *inference* that the corporation *has subjected itself* to the jurisdiction and laws of the district in which it is served and in which it is bound to apear when a proper agent has been served with process. We refer this Honorable Court to the following authorities.

St. Louis S. W. Ry. v. *Alexander*, 227 U. S., 218.
International Harvester Co. v. *Commonwealth of Ky.*, 234 U. S., 579.
Peoples Tobacco Co. v. *American Tobacco Co.*, 246 U. S., 79.
Green v. *Chicago B. & Q. Ry.*, 205 U. S., 530.
International Text Book Co. v. *Pigg*, 217 U. S., 91.

In the case of

St. Louis S. W. Ry. v. *Alexander, supra,*

this Honorable Court said on page 227:

> "We reached the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court had decided each case of

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this character upon the facts brought before it and has laid down no all embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way, it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

In the case of

International Harvester Co. v. Commonwealth of Ky., supra,

this Honorable Court said on page 583:

"It has been frequently held by this court and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State. *St. Louis S. W. Ry. v. Alexander*, 227 U. S., 218, 226 in cases there cited. As was said in that case each case must depend upon its own facts and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the State."

In the case of

Peoples Tobacco Co. v. American Tobacco Co., supra,

this Honorable Court said on page 86

"The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this

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court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted."

In the case of

International Text Book Co. v. Pigg, supra

this Honorable Court said on page 104

"While the Supreme Court of Kansas has distinctly held that the statute did not embrace single transactions that were only incidentally necessary to the business of a foreign corporation, it also adjudged that the business done by the Text-book Company in Kansas was not of that kind, but *indicated a purpose* to regularly transact its business *from time to time* in Kansas, and therefore it was to be regarded as doing business in that state, within the meaning of the statute; and that it 'was the intention of the legislature that the state should reach every continuous exercise of a foreign franchise,' and that it should apply even where the business of the foreign corporation was 'purely interstate commerce. *John Deere Plow Co. v. Wyland*, 69 Kan., 255, 257, 258; *State, ex rel Shawnee County v. American Book Company*, 65 Kan., 847; *Sigel-Campion Live-stock Commission Co. v. Haston*, 68 Kan., 749. In our judgment those rulings as to the scope of the statute were correct." (Italics ours.)

Let us test the facts in the instant case by the rule laid down by this Honorable Court. Is the business that the

defendant company has transacted in Ohio such in character and extent as to warrant the *inference* that the corporation has *subjected* itself to the jurisdiction and laws of the district in which it was served. To determine this, we must look to the very nature of the defendant's business. It is a construction company that migrates about the state in the furtherance of its work requiring no definite office or any fixed abode within the state. It is in Ohio since its entrance in 1910 in direct competition with all other construction companies therein. Its work of course is not of such a character that at all times it is physically present within the state in the erection of buildings but during the intervals between the actual work of construction it maintains an agent at Columbus, Ohio, and is looking for prospects on which it may bid and which will develop into construction work. In the course of these years, it has constructed three large buildings of which we have knowledge and possibly other buildings as was admitted by the obdurate and retiscent Secretary who refused to disclose the extent of the defendant company's operations in Ohio at the time his deposition was taken. The record discloses that the last manual work on the part of the defendant company was completed in Cleveland in October, 1918, a few months preceding the filing of the petition but the company did not withdraw from the state nor did it cease to do business therein as it retained its office in Columbus, filed its report in July, 1919, showing the extent of its operations in Ohio during the twelve months preceding June 30, 1919, and competed with other companies in Ohio for prospects and work as is established by the deposition of the defendant company's secretary (pages 71-75). The season that immediately followed October, 1918, was the winter season during which time it is well known out-

side building construction is not commenced. This probably had considerable to do with the fact that there was no manual construction at the time when the suit was filed. Surely, it can not be held that the company ceased to do business merely because its manual labors have ended, when such work may again be commenced at any time in the future. Does not this record establish that this business of the defendant company is of such character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served. The record discloses that there was no intention on the part of this defendant company at any time to withdraw from the state and to cease operations within the state. The fact that there was no manual operation at the time of the suit and service was not because the company had ceased operations within the state but because the building which it had been erecting was finished a few months before the suit was filed. The company still continued to do business in the state by holding itself out for further work and recognized this by keeping alive its agency in Ohio and its corporate right to continue its operations within the state.

The facts in the instant case are not parallel with the facts of *Chipman, Ltd.*, v. *The Thomas B. Jeffrey Company*. In that particular case, the defendant at a time when it was doing business in New York, to-wit, July 1914, complied with the statutes of New York, by naming a designated agent upon whom process might be served. It is admitted, however, that the defendant had removed from the state several years before service on this agent and accordingly, at the time the company was not engaged in doing business within New York. This Honorable Court reiterated the law decided by the foregoing opinions and held that as this defendant company was

not doing business at the time of the service, process upon an unrevoked agent did not bring the corporation within the jurisdiction of the court. The instant case is clearly distinguishable because the defendant company at no time removed from the state but continued its presence therein by continuing in competitive operation with the other construction companies in Ohio and by filing its corporation report in July, 1919 (a month after service), in which it showed that the extent of its operations during the twelve months preceding June 30, 1919, amounted to $10,544.91.

We respectfully request the court to bear in mind in passing upon this question that the tendency of legislative and judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations. As was said by Mr. Justice Gray in

> *Barrow Steamship Co.* v. *Kane*, 170 U. S., 100:
> "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

Mr. Justice Peckham in

> *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Charles C. Meyer*, 197 U. S., 418

indulges in strong language against the hardship and unwisdom of requiring a citizen of one state to follow a foreign corporation to another state to seek redress in a cause of action in the state of which he is a citizen.

We accordingly submit that the business of the defendant company is such in character and extent as to warrant the inference that the defendant company has subjected itself to the jurisdiction and laws of the district

in which it was served and that it is bound to appear as a proper agent had been served with process.

THE COURT ERRED IN QUASHING THE SUMMONS ISSUED BY THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO.

The district court held that the process of service issuing out of the Common Pleas Court of Hamilton County, Ohio, was invalid and accordingly sustained the motion to quash this service. We submit that in this respect, the court committed error. The right to bring a suit within a particular county is defined by Section 11276 of the General Code of Ohio, which reads as follows:

> "An action other than one of those mentioned in Sections 11268, 11269, 11270 and 11271 against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant, *or where such defendant is found*, or where the cause of action or some part thereof, arose."

The action could therefore be brought in any county where the defendant was found. To determine this, we refer this court to Section 179 of the General Code which reads as follows:

> "Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of the capital stock of the corporation, the business in which it is engaged or in which it proposes to engage within

this state; the proposed location of its principal place of business within this state; and the name of a person designated as provided by law, upon whom process against the corporation may be served *within this state*. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation."

This Honorable Court will note from the reports of the defendant for the years 1918 and 1919 that were filed in compliance with the Ohio law, the company named no office or place of business as the location of the principal place of business within the state. This was because the defendant was engaged in the construction business and as its work was of a migratory nature throughout the state, it had no definite office at all times. We desire to call this Honorable Court's particular attention to the words of the statute as to the agent named for service, to-wit:

"And the name of a person designated as provided by law, upon whom process against the corporation may be served *within this state*."

This Honorable Court will note that the naming of the agent is for service "within this state" and is not applied to any particular county. He may accordingly be served with process issuing out of any county in this state for he is the agent for such service at any place "within the state." This has been definitely decided by the Ohio courts and according to the decisions of this Honorable Court will be followed by the Federal Court. (*Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S., 93; *N. Y. L. E. & W. R. Co.* v. *Estill*, 147 U. S., 591.) The Ohio statutes provide a means of issuing this process from one county to another. We re-

for this Honorable Court to Section 11282 of the General Code of Ohio.

We cite the following authorities in support of our contention that the agent named in compliance with Section 179 of the General Code is the agent for service "within the state" for actions brought in any county of the state.

Blanton v. *Burroughs Adding Machine Co.*, 13 O. N. P. (N. S.), 423.
Handy v. *Insurance Co.*, 37 O. S., 366.
Werron v. *Metropolitan Life Ins. Co.*, 166 Pa., 112.
Sattler v. *Altman & F. Machine Co.*, 6 Pa. Dist. R., 419.
Stone v. *Traveler's Ins. Co.*, 78 Mo., 655.
Olson v. *Osborne*, 30 Minn., 444.
Eickhoff v. *Fidelity & Casualty Co.*, 78 Minn., 139.
Kennedy v. *Agricultural Ins. Co.*, 165 Pa., 179.

In the case of

Blanton v. *Burroughs Adding Machine Co.*, 13 O. N. P. (N. S.), 423.

the syllabus of the case is as follows:

> "The agent of a foreign corporation doing business in this state may be served in any county in the state where he may be found and by process issuing out of any county in the state."

The court said on page 423:

> "This is an action upon an alleged breach of contract of employment to sell adding machines. The defendant is a foreign corporation. Service of summons was made upon F. S. Crane at Cleveland, Cuyahoga County, through the sheriff of Hamilton county and the sheriff of Cuyahoga county. Motion is made 'to dismiss the service

of summons and the return,' because the same were not properly made.

"The question raised by the motion is: Can the defendant thus be brought to this county to defend, or must the plaintiff go to Cuyahoga county to prosecute?

* * * * * *

"This law (Section 179, General Code) clearly provides that a person must be named upon whom process may be served within this state, but the section is silent as to where he may be served. After certificate granted the foreign corporation may do business anywhere in Ohio —may have branches anywhere in Ohio.

* * * * * *

"The act governing service upon the designated agent does not tell where he shall be served.

"The court is of the opinion he may be served in any county where he may be found in the state and by process issuing out of any county in the state."

In the case of

Handy v. *Insurance Co.*, 37 O. S., 366.

the court said on page 370

"The general jurisdiction of the Court of Common Pleas, over the person of litigants, is not confined to residents or natural persons; non-residents of the state and foreign corporations are as much subject to its jurisdiction as are residents and domestic corporations. Except in actions of a local nature our courts are open to all who may seek relief therein, against any one who can be reached by its process. We know of no principle that will exempt a foreign corporation, which voluntarily comes into this state, from liability to answer any complaint which may be preferred against it in the courts

of the state, that would not exonerate natural persons under like circumstances.

"The county in which actions are to be brought, as well as the mode of acquiring jurisdiction by notice to defendants, is regulated by statute. Among other provisions on this subject, Section 52 of the Code of 1853 provided that 'an action * * * against a non resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose.' The general rule here declared has no reference to actions upon causes arising in this state. No matter where the cause arose, if the subject matter be within the jurisdiction of the court. Nor is the rule confined to corporations other than insurance companies. *Any foreign corporation which may be found in this state, may be sued in any county of this state*, in any court having jurisdiction of the subject matter of the suit." (Italics ours.)

In the case of

Kennedy v. *Insurance Co.*, 165 Pa., 179.

the court had occasion to pass upon a question similar to the one at bar. In the state of Pennsylvania, there was a statute requiring insurance companies to designate an agent to receive service of process for said company as if served personally on the company "within the state." This action was brought in one county and service was had upon the designated state agent of the insurance company in another county. On page 182 of the report, the court said:

> "In other words, we are of opinion that, in the circumstances of this case, the service of the writ, on the garnishee companies state agent, was made according to the provisions of the act and its legal effect is the same as if it had been served personally on his principal, *within the state*. If the purpose of being served with any 'writ, rule, order, notice of decree,' authorized by the act, *the said agent is pro hac the company itself, and is to be constructively regarded as a resident of each and every county in the state.*" (Italics ours.)

These authorities are fully sustained by the authorities outside of Ohio and that are cited herein.

Accordingly and particularly as the Federal courts will follow the state decisions as to service, service may be had on the designated agent in Franklin county on a cause of action filed in Hamilton County by a resident of Hamilton County.

The U. S. District Court Had Power to Issue Its Process After Removal to Any Part of Its District.

It was contended by the defendant at the hearing below that no alias summons could issue out of the District Court because the plaintiff filed no petition in the District Court and instituted no action therein, the action having been instituted in the state court and having come to the District Court on a petition for removal. It was also contended by the defendant that the District Court sitting in the Western Division had no power to issue its process to the Eastern Division of the said district. Both of these contentions were overruled by the District Court and an entry was accordingly made in favor of

the plaintiff (page 24). The court reversed its own ruling after the decision of this Honorable Court in the case of *Chipman, Ltd.*, v. *The Thomas B. Jeffry Company*, but not upon these contentions.

The record discloses that immediately after the case was removed the plaintiff obtained service of an alias summons out of the District Court upon the designated agent who resided in Columbus, Ohio, which is located in the Eastern Division. The plaintiff was not compelled to wait until the process that was issued out of the state court was attacked but could issue a second process through abundant precaution. We cite this Honorable Court to the following case:

> *State of Ohio, ex rel*, v. *Standard Oil Co.*, 15 O. C. C. (N. S.), page 212

in which the court said on page 216:

> "That when a party discovers that good service has not been made, he is not required to await the action of some court before he may proceed to correct this defect. If he were required to do so, it might well result, as we can all readily see, in very great inconvenience and loss, especially where the court to which the party must apply is not in session. *We think that this should be so especially in a case where the service is attacked by the other party, so that the party attempting to procure service is apprised of the fact that there will be no acquiescence in the defective service, but that the defendant will stand upon his rights.*" (Italics ours.)

We procured the alias summons promptly so as to be certain that the defendant was in court.

This now raises the question whether an alias summons can be issued in a case that was commenced in the

state court and then was removed by petition to the United States District Court. In the case of

Lebensberger v. *Scoffield et al*, 139 Fed. Rep., 380 (6 C. C. A.)

it was held that the Federal Court had power to issue an alias summons in a case in which the action had been commenced in a state court and which subsequently had been removed to the Federal Court. On page 383 the court said:

> "The Circuit Court held that the case was properly removed, but held that its summons was void, which was equivalent to saying that, though it had acquired jurisdiction of the cause, it could take no steps to acquire jurisdiction of the defendants, or, again that the defendants had defeated the action by removing it. The cause was pending in the Circuit Court at the time when that court issued its summons and when it was served. It is true, a motion to dissolve the attachment had been made while the cause was pending in the state court, and was still pending in the Circuit Court at the time the summons was served. But notwithstanding this, the court then had power to get jurisdiction of the defendants, if it could, and the subsequent dissolution of the attachment could not defeat the complete jurisdiction of the principal suit thus acquired. When the cause was removed, the court was bound to proceed. What was it to do? The act of Congress declares that 'It shall then proceed in the same manner as if it had been brought there by original process.' The first step must be to give notice to the parties. Ordinarily the notice to be given might perhaps be by publication. But as she had then come into the jurisdiction, actual service could be had. And we think it can not be doubted that the Circuit Court had power to issue the summons."

It is also contended that the District Court for the Southern District of Ohio sitting in the Western Division was limited in its process to the counties comprising the Western Division and accordingly it could not issue its process to the Eastern Division and serve an agent of a foreign corporation located in the Eastern Division. This contention is absolutely contrary to the daily proceedings of this court as processes are issued repeatedly out of this court from the Western Division to the Eastern Division of the district. Section 968 Compiled Statutes (Judicial Code No. 1) creates the district court including the Northern and Southern Districts of Ohio. There is no limitation of power as to the jurisdiction of either of the judges of these districts within their district. Section 1087 Compiled Statutes (Judicial Code No. 100) defines what counties constitute the Northern District of Ohio and what counties constitute the Southern District of Ohio and also what counties in each district will comprise the divisions. There is nothing in this act which limits the jurisdiction of the District Court within the boundaries of a division. Section 1033 Compiled Statutes (Judical Code No. 51) provides within what district a suit may be brought between citizens of different states. Section 1035 (Judicial Code No. 53) provides as follows:

> "When a district contains more than one division, every suit not of a local nature entered against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. *All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district.* * * *"

In the recent case of

Primrose Chemical Co. v. *Fulton Steel Corporation*, 254 Fed. Rep., 454

the court says in its syllabus:

> "Under Judicial Code 69-115 (Compiled Statutes 1916 Nos. 1051-1106) and in view of Section 1 (Section 968) the jurisdiction of the *several* district courts *is co-extensive with the boundaries of the judicial district* and extends no further save as Congress has expressly extended it." (Italics ours.)

We wish to call particular attention to the language of Section 1035 Compiled Statutes (Judicial Code No. 53) to-wit: that when a district contains more than one division against a single defendant, suit must be brought in the division where he resides. The defendant in this case is a foreign corporation and under the authorities it has only one domicile—one place of residence and that is the state of its incorporation. *Shaw* v. *Quincy Mining Co.*, 145 U. S., 144 and *Southern Pacific Co.* v. *Denton*, 146 U. S., 204. It therefore is not a resident of either the Western or Eastern Division of the Southern District of Ohio. This part of the section therefore is without application. This is in accord with the authorities.

In the case of

McCullough v. *United Grocers' Corp.*, 247 Fed. Rep., 880.

On page 881, the court said:

> "The jurisdiction of this court is based upon a diversity of citizenship between plaintiff and defendant. Plaintiff's petition avers that he is a citizen of the state of Ohio and a resident of the city of Cleveland, Ohio. This makes him a

resident of the Eastern Division of the Northern District of Ohio. The defendant, it is averred, is a corporation, organized and existing under the laws of the state of Delaware, and is engaged in the wholesale grocery business, with its principal place of business in the city of Toledo, Ohio. Toledo is in the Western Division of the District. The marshal's return shows that the summons was served on the defendant—

'by leaving at the usual place of business (in Toledo) of the United Grocers' Corporation, with H. E. Wetherill, secretary and treasurer of United Grocers' Corporaton, personally, a true and certified copy hereof.'

"Defendant appears specially and moves to quash and set aside the service of summons on two grounds: (1) that this action must be brought in the Western Division, because the defendant resides there; (2) that defendant being a foreign corporation, service can be had only on its managing agent.

"(1) Section 53, Judicial Code, provides that:

" 'When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides.'

"If it be true that, on the fact averred, the defendant resides in the Western Division of this district, this motion should be sustained. In *Page* v. *Chillicothe* (C.C.), 6 Fed., 599, Swing, District Judge, considering similar language, contained in the law, creating the Eastern and Western Division, of the Southern District of Ohio, expresses the opinion that an action must be brought in the division in which the defendant resides, and only refused to dismiss because defendant had appeared generally and was held thereby to have waived his privilege of being sued in the division in which he resided. But later, in *United States* v. *Eddy* (C. C.), 28 Fed., 226,

the same question was carefully considered in an action instituted in this district. The motion was made to set aside the service, and was heard to Judges Welker and Hammond. The question was regarded of such importance that, at the suggestion of Judge Hammond, the hearing was adjourned to be heard before Mr. Justice Matthews of the United States Supreme Court and Judge Welker. It was held that the summons was improvidently and irregularly issued, service was set aside, and, a new summons having been issued later and served, the statute of limitation, it was held, did not cease to run until the suing out of the second summons.

"The case here, however, is different. In my opinion, this case is controlled, not, by Section 53, but by Section 51 of the Judicial Code. The latter section provides that, where jurisdiction is founded upon diversity of citizenship, the suit shall be brought only in the district of the residence of either the plaintiff or defendant. The defendant, being a foreign corporation, it is settled law, is a citizen and resident only of the state under the laws of which it is organized; and, in as much as the plaintiff is a citizen and resident of the Northern District of Ohio and of the Eastern Division thereof, and the defendant a citizen and resident only of the state of Delaware, this action was properly instituted in the Eastern Division. *Shaw* v. *Quincy Mining Co.*, 145 U. S., 444, 12 Sup. Ct., 935, 36 L. Ed., 768; *Southern Pacific Co.* v. *Denton*, 146 U. S., 204, 13 Sup. Ct., 44, 36 L. Ed., 942. See Simkins' Federal Suit in Equity, pp. 109, 115, where the authorities are cited and reviewed."

We submit that this court has power to issue its process from the Western Division to the Eastern Division of the District as it is a court for the district and not

merely a court for the division. The creation of the division did not limit the jurisdiction of the district court but was created merely for the personal convenience of defendants residing within the division. This is shown by the case of *Paige and others* v. *The City of Chillicothe*, 6 Fed. Rep., 599. This is furthermore evident by Section 1035, Compiled Statutes (Judicial Code No. 53). We call the court's attention to the following language from this section:

> "All *mesne* and *final process* subject to the provisions of this section *may* be served and executed *in any or all* of the divisions of the district."

This Honorable Court can come to no other conclusion if these words are given their ordinary sense and meaning.

The defendant cited to the learned court below the cases of *Wange* v. *Public Service Railroad Company*, 159 Fed., 189, *Vitkus* v. *Clyde Steamship Company*, 232 Fed., 288, and *Ludosewicz* v. *Coal and Iron Company*, 232 Fed. Rep., 292, in support of this contention that this court could not issue its process from the Western Division to the Eastern Division. But these cases are without application because in all of these cases, the court held that a Federal Court could not issue its process from *one district to another district*. This is evident as a district court is created for the district and the district is its territorial limitation except of course, in cases specifically provided for by statute. The other case cited by the defendant is the case of

Kibbler v. *Railroad Company*, 147 Fed., 879.

The present judicial code was not enacted at the time this case was decided. That district court predicated its action upon the Act of Congress creating the Eastern Di-

vision of the Southern District of Alabama. The court referred to the Act of March 3d, 1905. 33 Statutes, 988, which provided:

> "That all suits brought against a single defendant inhabitant of said state must be brought in the division of the district where he resides."

The section in which this language is contained in the act says nothing about the power of the court to issue its process to all or any of the divisions. The court without any reason limits its power to issue process within the division in which it is sitting and does so apparently because the section is silent as to the scope of the territory within which the process of the court can issue. Section 7 of this Act provided however that all *mesne* and final process subject to the provision hereinbefore contained issued in either of said divisions may be served and executed in either or all of the divisions. This language was probably overlooked by the district court as no reference is made to it whatsoever in the opinion. It may it may be possible that the court considered that it was limited to the process summoning the grand and petit jurors as it is included in the same paragraph with reference to them. This case however is directly contrary to the case of *McCullough* v. *United Grocers' Corporation*, 247 Fed. Rep., 880. In this latter case it was held that as the foreign corporation was not a resident of either the Eastern or Western Divisions of the Northern District of Ohio, Section 1035, Compiled Statutes (Judicial Code No. 53), has no application but that Section 1033, Compiled Statutes (Judicial Code No. 51) applied. A process was issued out of the Eastern Division of the Northern District and served upon an agent in the Western Division. This we submit is a process within the territorial limits of the court, to-wit: the entire district of

the Northern District of Ohio. Process was therefore properly issued in the case at bar.

CONCLUSION.

We respectfully submit that the record discloses that at the time of the service the company was engaged in doing business in Ohio of such character and extent as to warrant the inference that it had subjected itself to suit in the jurisdiction of the District Court of the Southern District of Ohio. It was contended in the learned court below that it is also essential that the cause of action arose in Ohio but such contention is without merit.

Pennsylvania Fire Insurance Co. v. *Gold Issue Mining & Milling Co.*, 243 U. S., 93.
Smolick v. *Coal & Iron Co.*, 222 Federal, 148.
Handy v. *Insurance Company*, 37 O. S., 366.
Blagdon v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y., 432.

The court had jurisdiction of the subject matter and having obtained jurisdiction by the process issued out of the Common Pleas Court of Hamilton County and by the process issued out of the District Court upon a proper agent of the defendant company while the defendant company was doing business in Ohio the service is a valid one. The defendant is before the District Court and should be made to appear to defend the suit. The judgment and order of the District Court should be reversed.

Respectfully submitted,

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February 18, 1921.

APPENDIX.

Section 178 (General Code):

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

Section 179 (General Code):

"Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of the capital stock of the corporation, the business in which it is engaged or in which it proposes to engage within this state; the proposed location of its principal place of business within this state; and the name of a person designated as provided by law, upon

whom process against the corporation may be served within this state. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation."

Section 5499 (General Code):

"Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe."

Section 5501 (General Code):

"Such report shall contain:

"1. The name of the corporation and under the laws of what state or county organized.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock, and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

"7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state.

"8. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 340.

THE ROBERT MITCHELL FURNITURE COMPANY,
Plaintiff in Error,

vs.

SELDEN-BRECK CONSTRUCTION COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

I.

STATEMENT.

In our argument we will refer to the parties as plaintiff and defendant, since they occupy the same relation here as below.

The statement of counsel for plaintiff in error in their brief must be supplemented in a few particulars.

In order to avoid confusion we call attention to the fact that the first original summons (not the alias summons) was issued out of the state court on April 5, 1919, (Record, page 5) and not being returned in time, the service of the same was set aside by the State Court at the motion of the plaintiff. (Record, p. 7.) Not being informed of this order the defendant, within the rule of the defective summons, filed a motion to quash which was overruled by the State Court, because the action prayed for had already been taken at the instance of the plaintiff itself. (Record, p. 9.) No merit is claimed by the plaintiff for this original summons. This disposition of the original summons is set forth here because the several summons are confusing. As a matter of fact the lower court in passing upon the subsequent motions assumed that the order made by the State Court overruling the defendant's motion to quash the service of the first original summons was the same motion which was then being addressed to the District Court. (See Addenda to Opinion of Peck, J., Record, page 23.)

Two writs were subsequently issued:

First. An Alias Summons issued in the State Court April 22, 1919, fixing May 24, 1919, (Record, page 6) as the rule day. On May 21, 1919 (Record, pages 10-14) and within the rule day of this summons, the necessary proceedings for removal were had. This summons was served on April 23, 1919. (Record, page 8.)

Second. After the docketing of the case on removal

in the District Court, another Alias Summons; (Record, pages 15-16) issued out of the District Court to the United States marshall upon the precipe of the plaintiff. (Record, page 15.) This summons was served on June 24, 1919. (Record, page 16.)

In our argument we distinguish these two alias writs by referring to them as Alias Summons in the State Court and the Alias Summons in the District Court respectively.

No motion was made in the State Court as to the service of the Alias Summons in that Court. (The language of counsel for plaintiff—their brief, page 2—might be construed as stating that such a motion was made in the State Court, though counsel, of course, did not intend to make such statement.) However, on July 19, 1919, the defendant filed, within rule, in the District Court two separate motions, to wit:

First. A motion to quash service of the Alias Summons in the State Court, pretended to have been served on April 23, 1919, (Record, page 17ff).

Second. A motion to quash the service of Alias Summons in the District Court pretended to have been served on June 23, 1919, (Record, page 19ff).

Each of these motions sets forth a number of grounds which place squarely in the record the defendant's timely objection to the service for all of the reasons which are presented in argument. In other words, the contention that the defendant was not "doing business in Ohio," together with the other contentions, was at once presented to the court.

As stated by counsel, both of these motions were passed

upon by the District Court (the first and only court t
pass upon the question of the validity of service), o
December 11, 1919, (Record, page 22) and the service o
the Alias Summons in the State Court was set aside
while that of the Alias Summons in the District Cour
was held valid. A Bill of Exceptions was at the tim
submitted by the defendant and allowed by the court o
December 23, 1919. (Record, pages 26-29.)

Subsequently the court itself, (Peck, J.), upon receip
of the advance sheets of the Opinion (rendered January
19, 1920), in the case of Chipman, Ltd., vs. Jeffery Com
pany, now reported in 251 U. S., 373, called the attention
of counsel to the same, with the result that the defendan
on February 21, 1920, filed a motion for rehearing (Rec
ord page 80), of its motion to quash the service of the
Alias Summons in the District Court. This motion was
sustained and the service of the Alias Summons in the
District Court set aside on March 15, 1920. (Record,
p. 81.)

Counsel in their statement, (plaintiff's brief, page 2),
say that the only question is whether the "facts come
wholly within the ruling of this Honorable Court in the
case of Chipman, Ltd., vs. The Thomas B. Jeffery Com-
pany." We contend that the case of Chipman, Ltd., vs.
Jeffery Company is decisive of the case at bar, but we do
not quite agree with counsel in saying that this is the
only question in the present case. We present other
questions, but we desire, in doing so, to be considered as
not having any doubt whatsoever of our position as to
the decisiveness of the case of Chipman, Ltd., vs. Jeffery
Company.

We call attention to the fact that in Ohio there are two statutes governing the entrance of foreign corporations, Section 178ff, General Code of Ohio, applicable to those merely transacting business, and Section 183ff, General Code of Ohio, applying to those which have a portion of their capital in Ohio. (See this brief, p. 25.) According to the requirement and practice of the Secretary of State the defendant complied with both provisions. (Record, pp. 56-7.) However, only Section 178ff requires the statutory agent. The compliance with the other section was surplusage and is not involved in this case.

II.

THE SEVERAL QUESTIONS FOR CONSIDERATION.

We indicate, at this point, the several questions which present themselves.

First, and foremost, as just indicated, is whether there is anything in the facts to distinguish the case at bar from the case of Chipman, Ltd., vs. Jeffery Company, 251 U. S., 373. The facts show these two cases to be the same case and not distinguishable.

Second. We contend that under the decisions of the Supreme Court of Ohio, the act of complying with a statute imposed upon foreign corporations, is void and of no effect, unless the corporation so complying comes within the terms of the statute, that is unless it is doing business in Ohio. This is simply a statement in different language of the same proposition announced by this court in the case of Chipman, Ltd., vs. Jeffery Company.

Third. The service of the Alias Summons in the State Court. The plaintiff now insists that the lower court was in error in quashing this service. This necessarily brings up for consideration other questions, and specially whether or not a summons issued from one county can be legally served on the designated statutory agent in another county. A decision of an Ohio Nisi Prius Court cited by counsel for plaintiff at page 16 of their brief, Blanton vs. Burroughs Adding Machine Company, 13 Ohio N. P. (N. S.), 423, is the only authority cited to sustain the plaintiff in this argument, while the higher court case cited (Handy vs. Insurance Company, 37 O. S., 366, cited at page 16, plaintiff's brief) in effect affirms the contrary.

Fourth. The question also arises as to the validity of the issuance of summons out of the District Court after removal. The only authority cited for such a summons is the decision in the Sixth Circuit, Lebensberger vs. Scofield, 71 C. C. A., 476, 139 Fed., 380 (cited by counsel for plaintiff at page 21 of their brief). We contend that if there has been no service before removal then there is nothing to remove, and that life cannot be breathed into the action after removal. Of course it may be necessary to remove the case in order to secure the decision of the Federal Court that there was no service.

Fifth. The case was removed to the Western Division of the Southern District of Ohio. The Alias Summons in the District Court was issued out of the Western Division but was served by the United States Marshal at Columbus, Ohio, in the Eastern Division. We claim that service outside the division was invalid.

Sixth. Since the service, which is in fact relied upon by the plaintiff, is the service of the Alias Summons issued out of the District Court, and since service upon such a designated statutory agent is had upon the basis of the written stipulation filed with the Secretary of State of Ohio appointing that statutory agent, we present the further question of whether the language of that stipulation which provides for service in actions brought **"in any of the courts of the State"** (Record, page 56), can be broadened by construction so as to include service in actions instituted in the Federal Courts. This stipulation is on a printed form prepared by the Secretary of State and this printed form is a construction by a state officer of what the statute requires.

III.

CHIPMAN, LTD., VS. JEFFERY COMPANY CANNOT BE DISTINGUISHED.

The first two paragraphs of the opinion in Chipman, Ltd., vs. Jeffery Company, with proper changes, would apply in the case at bar. In both, the case was removed and the service set aside after removal.

The New York Statute is quoted in the Opinion in Chipman, Ltd., vs. Jeffery Company. It requires the filing in the office of the Secretary of State of a stipulation designating:

> "a place within the State which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the State"

(from the opinion, 251 U. S. at page 377).

The person so designated must consent thereto, and the designation:

> "shall continue in force until revoked by an instrument in writing,"

(from the opinion, 251 U. S. at page 377).

Such a stipulation was filed, an agent being named and a place of business being stated. (See Opinion, 251 U. S. at page 378.)

The language of the Ohio Statute is substantially the same. Section 178, General Code of Ohio, requires that the corporation secure a certificate of authority and Section 179 states that before granting such certificate the Secretary of State must require a filing of a copy of the charter and a statement under seal setting forth:

> (1) A statement as to capital stock and nature of business;
>
> (2) "the proposed location of its principal place of business within this state;"
>
> (3) "and the name of a person designated as provided by law, upon whom process against the corporation may be served within this state;"
>
> (4) It is further required by the section that "the person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation."

The language of the Ohio Statute as to the designation of a person upon whom process against the corporation may be served "**within this state,**" is the language of the New York Statute, "**the state**" being changed to "**this** state." While the Ohio Statute does not, in words, require the designation of a principal office it does require (see item 4 above) that the statutory agent have

an office at the principal place of business of the corporation. The stipulation filed in the office of the Secretary of State fixed the office of the statutory agent as the principal office of the company, (see stipulation, Record, page 56). While the Ohio Statute does not, in words, require the agent to consent, still in the stipulation which was filed on the printed form issued by the Secretary of State, the agent did consent. (See Record, page 58.)

The Ohio Statute contains no language similar to the New York Statute that the appointment "shall continue" until revoked, but Section 181 of the General Code of Ohio provides, in case of the death or removal of the agent, for substituted service upon the Secretary of State.

> "In an action upon the (sic) liability incurred within this state before such revocation."

Pursuant to the foregoing statutory provisions the defendant did appoint Simeon Nash such agent, and "**his office**" at the Ruggery Building, Columbus, Franklin county, Ohio, was designated as the principal office of the company. The agent accepted the appointment, and consented to the designation of his office. The stipulation is set forth at pages 56 and 57 of the record and was filed in the office of the Secretary of State on December 6, 1919.

The Ohio Statute is substantially the same as the New York Statute; in each case the agent was appointed and the office designated; in neither case was the designation revoked.

In Chipman, Ltd., vs. Jeffery Company the contracts in question were made in Wisconsin. (Opinion, 251 United States at page 377.) In the present case the execution of the contract was consummated by mail, and the contract came into existence at Chicago, Illinois, as is shown by the final letters covering the execution, Exhibits D and E, page 35 of the Record.

In Chipman, Ltd., vs. Jeffery Company the contract could have been performed either in New York or Wisconsin. In the present case the contract was to be performed by the delivery f. o. b. cars at Ann Arbor, Michigan, of all of the interior cabinet wood-work of the Library Building of the University of Michigan. (The contract is set forth at pages 37-44 of the Record.)

In Chipman, Ltd., vs. Jeffery Company payment was to be made at Kenosha, Wisconsin. In the present case no place of payment was specified nor is there anything in the contract bearing upon the subject. It is therefore the place of execution of the contract, namely, Chicago, Illinois. (See opinion of Lower Court on this point, Record, page 23.) We do not understand that this is disputed. The contract in the case at bar was not entered into, nor was it to be performed, nor was payment under it to be made, in Ohio. Therefore our case, if location of performance bears upon the question, is stronger than that of Chipman vs. Jeffery Company.

Up to this point the facts in the two cases are precisely similar.

While counsel in their statement (plaintiff's brief, page 2) announce that the only question is whether the

two cases can be distinguished, they do not follow the text but wander off into what constitutes "doing business." Finally coming back to the text they state at page 12 of their brief:

> "It is admitted, however, that the defendant had removed from the state several years before service on this agent and accordingly at the time the company was not engaged in doing business within New York."

Counsel then go on to make the only definite statement which can be found in their brief as their ground for distinguishing the two cases:

> "The instant case is clearly distinguishable because the company at no time removed from the state but continued its presence therein by continuing in competitive operation with the other construction companies in Ohio and by filing its corporate report in July 1919 (a month after service), in which it showed that the extent of its operations during the twelve months preceding June 30, 1919, amounted to $10,544.91," (plaintiff's brief, page 13).

Counsel state two facts which they claim distinguish, **first**, that the defendant continued in "competitive operation with the other construction companies in Ohio" and **second**, that the month after the service of summons it filed a report with the tax commission of Ohio.

Let us take up the report to the tax commission first. This report is set forth in pages 49-52 of the record. We refer now to the report for 1919. The report for 1918 is in the record but nothing is claimed for that report. We

find in the 1919 report the following pertinent statements:

1. Under paragraph 5, (Record, page 50) the following answer to a question as to offices and agencies in Ohio is given: Name of office or agency, none;
Name of officer or agent in charge of its business in Ohio, Simeon Nash;
P. O. address of officer or agent, Columbus Ohio.

2. Under paragraph 15 we find:
Value of property owned and used in Ohio, separated by counties, none;

3. Under paragraph 16:
Total statement of property in Ohio, none;

4. The total value of the property owned and used by the company in the State of Ohio, none;

5. Under paragraph 18 the amount of business done in Ohio for the 12 months ending June 30, 1919, is stated as $10,544.91.

The only matters contained in this report applicable to the question at hand are first, the statement that Simeon Nash is its agent and second, that it had done some $10,000.00 of business in Ohio during the preceding twelve months. These are mere statements of facts which are already shown elsewhere in the record. It is not claimed that the designation of the statutory agent had been revoked. It is admitted that business had been transacted in Ohio during the twelve months prior to June 30, 1919, but the defendant, and this is not disputed, has proved by testimony that all of that business had been completed and that all agents had left the State by October 26, 1918.

The affidavit of H. L. Campbell, vice-president of the defendant company, is set forth at page 54 of the Record

and shows that he was in charge of and had knowledge of the matters to which he testified; that on March 3, 1917 the defendant took a contract for the construction of the building of the State Bank and Trust Company at Cleveland, Ohio; that the work upon that building was completed and ended on October 26, 1918; that on said date all employes and officers and agents had been discharged or had left the State of Ohio, and he further testifies that since said date no bids of any kind had been made upon any work in the State of Ohio. This affidavit is sworn to on October 2, 1919, some months after the last service of Alias Summons.

To repeat, the last business in Ohio was completed and ended by October 26, 1918, while the petition was not filed in the State Court until April 5, 1919, and the service of the two alias summons was not made until April 23, 1919, and June 24, 1919, respectively.

There is no comfort for the plaintiff in the facts stated in this report, nor can there be any in the mere act of filing the report itself.

In the first place the report was filed on July 21, 1919, (Record page 52), after the service of Alias Summons, and if the act of filing had any operative effect, it certainly could not change the status which existed at the time of the service of Alias Summons. In the second place, the report is made to the Tax Commission of the State of Ohio and states that it is made, (Record page 49), in compliance with the provisions of an act of the General Assembly therein described. The section of that act under which this report was filed (101 Ohio Laws at page

422) is now found under a new number (changed in 102 Ohio Laws 224, at Section 110) as 5499 of the General Code of Ohio. Said Section 5499 requires such a statement to be filed annually during the month of July with the tax commission of the State of Ohio, and under the provisions a later Section, namely 5502, (present numbering), the tax commission determines, on the basis of this report, the tax due from the foreign corporation and certified the same to the Treasurer of State.

The defendant had been doing business, namely building the bank building at Cleveland, from the first day of July 1918 up to October 26, 1918, and the defendant owed the State of Ohio taxes for that business done in the State of Ohio. The defendant accordingly made its report as required by these facts, and the indorsement made by the tax commission on the report shows the proportion of business upon which the commission found it was to calculate the tax (see this indorsement page 52 of the record). There is nothing in this compliance with the requirements flowing from the business which had been done long prior to the institution of this action, that proves, or even tends to prove that the defendant was doing business in Ohio at the time the several summons were served. The defendant was not making this report nor paying this tax for the privilege of doing business in the future but was paying a tax for the business already done during the twelve months prior to June 30, 1919.

The other point which counsel for plaintiff make is that the defendant "continued in competitive operation

with the other construction companies in Ohio," (plaintiff's brief page 13). The idea is elaborated upon at pages 11 and 12 of plaintiff's brief. Their contention in their own language is that there "was no intention * * * at any time to withdraw from the state and to cease operations within the state," (plaintiff's brief page 12), and that the plaintiff continued to do business in Ohio, "by holding itself out for further work and recognized this by keeping alive its agency in Ohio and its corporate right to continue its operations within the state." (Plaintiff's brief page 12.) Counsel at page 11 refer to the "obdurate and reticent" secretary of the defendant company, Mr. Gosen whose deposition taken by the plaintiff, is set forth at pages 61ff of the record. Mr. Goshen was the clerical secretary of the defendant company and gave counsel for plaintiff such information as he had. In his testimony he said that Mr. H. L. Campbell, second vice-president, would be the witness to give information concerning construction and bids. (Record page 67.) Mr. Campbell testifies in his affidavit which is found at page 54 and his statement is that the last work done was in the bank building at Cleveland and that it ended October 26, 1918, and he further states:

> "That the defendant company has not had any contracts for work and has not done any work of any kind within the State of Ohio since the 26th day of October, 1918; that no bids have been made by the defendant upon any work in the State of Ohio since the 26th day of October, 1918 (Record, page 54)."

Therefore the facts are undisputed that all business done in Ohio ended on October 26, 1918 and that the

defendant had not even submitted any bids on work after said date. This date was four months and ten days prior to the filing of the petition in the State Court, it was four months and 28 days prior to the services of the Alias Summons in the State Court and it was seven months and 28 days prior to the service of the Alias Summons in the District Court upon which the plaintiff particularly relies.

Counsel make the point (plaintiff's prief page 12), that in the case of Chipman, Ltd., vs. Jeffery Company the defendant had removed from the State of New York "several years" prior to the attempted service. We understand that counsel have had access to the original printed record in that case, and their statement may be correct. However, this court attached no importance to the length of time intervening between the cessation of business and service. The statement of fact relied upon in the opinion is that:

> "The defendant had removed from the state before service on Adams." (Opinion 251 U. S. at page 378.)

The question is whether the defendant did in fact cease to do business. This certainly did occur on October 28, 1919 when the defendant physically removed from the state since which time it has never returned either to construct buildings or to make bids thereon. No court would sit and measure the length of time intervening between the cessation of the doing of business and the attempt to make service upon the defendant.

From all of which it follows that the only argument

which the defendant has advanced to distinguish the present case is that the defendant continued to do business by permitting the appointment of its statutory agent to remain un-revoked and thus keeping alive its right to return to the State of Ohio and "do business" therein at any time. This argument was equally present in the case of Chipman Ltd. vs. Thomas B. Jeffrey as is recognized in the opinion:

> "But, in emphasis of the requirements of the statute, it is urged that at all times of the duration of the contracts sued on and their breaches defendant was doing business in the state, and at any time had the right to transact business in the state." (From the Opinion, 251 U. S., page 378.)

The argument in our case which is presented to show that the defendant continued to "do business" in the state, when analyzed, is found to be based solely upon the proposition that the statutory designation of the agent was not revoked. This argument of course, begs the question and is exactly the same argument made in the case of Chipman Ltd. vs. Jeffery Company.

It must also be noted that nowhere does it appear, nor is it anywhere claimed that Simeon Nash was other than the mere technical statutory agent required by the statute, and it is nowhere claimed that at any time was he ever an active agent.

We are confident that the present case is the same case as that presented to this court in Chipman Ltd. vs. Jeffery Company, and this being true it follows that the judgment of the lower court should be affirmed. This court, while referring in the Opinion in Chipman, Ltd., etc., to

the New York decisions, very carefully made it clear that the basis of all jurisdiction, "the doing of business," must be present to sustain service of summons, whatever might be the decisions of the State Courts.

With full confidence we might very well end our argument at this point, however counsel for plaintiff have gone into the question as to what constitutes "doing business," and have brought up the matter of service of the Alias Summons in the State Court, so that it is necessary for us to cover the entire field.

Following up however our argument above as to the comparison of the case at bar with the case of Chipman Ltd. vs. Jeffery Co., we refer to cases which show that actual presence in the State is just as necessary in Ohio as elsewhere.

While the case of the Toledo Commercial Co., vs. Glen Mfg. Co., 55 O. S. 217, was decided upon the question of interference with interstate commerce, nevertheless the Supreme Court of the State of Ohio, in passing upon the original act which is now General Code Section 179, and which is the section under which the defendant qualified with the Secretary of State, goes beyond the question of interference with interstate commerce and holds that the statute itself which uses the phrase "before a foreign corporation for profit transacts business with this state," does not by its terms apply to sales of goods by itinerant agents. This of course is not applicable to the question under consideration but the language of the Court shows that there must be some actual presence of the company

in the state. We quote the following from the opinion, 55 O. S. at page 223:

> "The provisions of the law are not, as it seems to us, consistent with an intent to interfere with the enjoyment by corporations of other states of the ordinary privileges enjoyed, as matter of right, by citizens of the states generally, and hence the act does not apply to sales and delivery of goods such as are shown by the record in this case."

This decision is in conformity with the general theory of the Ohio Statutes and Section 11290, General Code of Ohio, requires service on a foreign corporation to be on a "managing agent." Service on a secretary even is not sufficient unless he also comes within the definition of a managing agent. McCullough vs. United Grocers Corporation, 247 Fed. 880, at page 882.

While the lower court decisions of a state are not binding upon the Federal Courts, nevertheless, as showing the trend of the law in Ohio, we wish to cite a recent Nisi Prius case, Dickey vs. Iron Works, 19 Ohio N. P. (N. S.) 492 which was affirmed by the Ohio Court of Appeals (an intermediate Appellate Court) without opinion. In this case the company's petition was filed upon a judgment taken in New York against an Ohio corporation. Service was made upon the vice-president personally within the jurisdiction of the New York Court. There was no evidence to show that the defendant was doing business in New York other than the statement of the petition upon which the judgment was rendered to the effect that the defendant had contracted to install at Malone, New York, certain water turbines and had in-

stalled the same and that after plaintiff has used the turbines for some two years they were found deficient, whereupon the defendant installed other turbines. The court holds that this did not show that the corporation was doing business in the State of New York, and that therefore the service upon the vice-president of the company within the State of New York was void and that hence the judgment was void.

A full consideration of the question what constitutes "doing business" under the Ohio laws is found in the decision of the District Court for the Northern District of Ohio, in the case of Beach vs. Kerr Turbine Co., 243 Fed., 706. This was decided upon a motion to quash service and the question was whether the individual upon whom service was made came within the definition of "managing agent" found in Section 11290 of the General Code of Ohio, to which we have just referred above. The defendant in this case was installing certain turbines at Youngstown and the court holds that during the period of performance of that contract it was doing business within the state. The language of the court is clear, however, that it is only while the contract is in the process of performance that the corporation is within the state. We quote the following from the opinion:

> "We are of the opinion that making a contract for sale of goods in another state is not doing business in the latter state. An isolated or single sale of goods in another state, or even occasional repetitions of such sales, would not be doing business within that state. The cases cited by counsel for plaintiff, as well as the others herein review, support this conclusion." (From the Opinion, 243 Fed., 711.)

We realize of course that the decision of the District Court has no authority in our argument here but we have referred to this case which has been decided by a District Court sitting in Ohio under the Ohio Statutes to show that the Ohio law is in entire accord wth the proposition that there must be some actual presence within the state in order to give the necessary basis for jurisdiction. We do not deny that the defendant was within the state while it was constructing the Deshler Hotel at Columbus, Ohio, or the State Bank and Trust Building at Cleveland, but after that work was ended and all agents and employes had been discharged or left the state, the presence of the defendant within the state ended.

The Ohio decisions are therefore in entire accord in principle with New York decisions referred to in Chipman vs. Jeffery Co.

IV.

UNDER THE OHIO DECISIONS A CORPORATION MUST BE WITHIN THE TERMS OF THE STATUTE IN ORDER TO GIVE OPERATIVE EFFECT TO COMPLIANCE THEREWITH.

In Ohio in addition to the statute referred to above there is a further statute which is found at Section 183ff, G. C. of Ohio, which applies to corporations owning or using part of their capital within the state.

These corporations must, under the provisions of Section 183, file a somewhat similar statement with the Secretary of State. The statute then goes on to provide in

Section 186 that a foreign corporation which has complied with Section 183ff is excepted from the process of attachment on the ground of non-residence or upon the ground that it is a foreign corporation.

This statute by Section 188 excepts from its operation companies engaged in interstate commerce. The Supreme Court of Ohio has held in the case of Bigalow Fruit Co. vs. Armour Car Lines, 74 O. S., 168, that the Armour Car Lines being engaged in interstate commerce, did not come within the statute and that therefore the fact that the company had gone through the form of complying with the statute did not exempt the company from the process of attachment. The court says:

> "A mere voluntary compliance with this section, by a corporation which is not within its purview, is an empty and meaningless form." (From the Opinion, p. 172.)

Of course here the language of the statute specifically excepted the defendant from the provisions of the statute. Yet that was a mere statement of the law. We have maintained in the present case from the first, and before we had had the benefit of the decision of this court in the case of Chipman, Ltd. vs. Jeffery Co., and that under the authority of this decision of the Supreme Court of Ohio, the compliance with Section 179 of the General Code of Ohio by a foreign corporation not actually present in the state was just as meaningless, and that likewise the act of compliance became meaningless upon the departure of the company from the state. This argument which we have made upon the basis of this decision of the Supreme

Court of Ohio is in fact merely a statement in other language of what this court did hold in Chipman, Ltd., vs. Jeffery Co. We refer to the decision in Bigalow Fruit Co. vs. Armour Car Lines, 74 O. S., 168, in order to show again that the Ohio law is in entire accord with the principles which are announced by the New York decisions and by the decision of this court in the case of Chipman, Ltd., vs. Jeffery Co.

V.

PLAINTIFF'S ARGUMENT AS TO THE LAW OF WHAT CONSTITUTES "DOING BUSINESS."

At page 7ff of their brief, counsel argue the law relative to the jurisdiction over a foreign corporation on the basis of "doing business." A number of cases are cited from which counsel at page 11 attempt to infer that "doing business" can be proven by **inference** and some sort of mental condition. The same authorities which are cited, however, show that there must be some presence within the state. For instance, in the quotation from the International Harvester Co. vs. Commonwealth of Kentucky, 234 U. S., 579, which is given at page 9 of plaintiff's brief, this court has said that it must be shown that the corporation is "**actually doing business**" within the state. In the quotation from Peoples Tobacco Company vs. American Tobacco Company, 246 U. S., 79, which is given at page 10 of the plaintiff's brief, this Court has said not only must there be the inference that the corporation has submitted itself to the local jurisdic-

tion but it must also appear that the company "is by its duly authorized officers or agents **present** in the state or district where such service is attempted." (From the Opinion, p. 87.)

From this quotation counsel draw the **inference** that the question for discussion is whether or not the business transacted by the defendant in Ohio has been such in character and extent:

> "as to warrant the inference that the corporation has submitted itself to the jurisdiction and laws of the district in which it was served." (Brief of plaintiff, page 11.)

Counsel in their argument at this point and elsewhere have overlooked, however, the proposition that the foreign corporation must **be present in the state,** and being there, must further by its acts subject itself. Counsel evidently have not read the case of Green vs. Chicago, etc., Ry. Co., 205 U. S., 530, in which the court held that maintaining an office and soliciting business, under the facts in that case, was not within the rule.

The case of Green vs. Chicago, etc., Ry. Co., supra, and Tyler Co. vs. Ludlow-Saylor Wire Co., 236 U. S., 723, approving it, are sufficient to show that even if the defendant had been submitting bids for work in Ohio, this would not have been within the rule.

We have analyzed the argument of counsel of plaintiff upon the facts in this case and have shown what their argument amounts to, is that the defendant had remained in the state, we might say psychologically, while it had departed physically. That is, the only fact present upon

which to base a finding that the defendant was doing business within the state was that the defendant permitted its qualification under the Ohio Statute to remain. This merely shows that the facts in the present case are precisely the same as those in the case of Chipman, Ltd., vs. Jeffery Co.

VI.

SERVICE OF SUMMONS IN THE STATE COURT.

We have shown above (page 14) that the contract sued on in the petition was not made in Ohio, was not to be performed in Ohio, nor was payment under it to be made in Ohio. It is not even claimed in argument that the cause of action arose in Hamilton County, Ohio.

The section of the General Code of Ohio which prescribes where suits may be brought against foreign corporations is Section 11276, and is quoted at page 14 of plaintiff's brief. This section provides that the suit may be brought in any county:

1. In which there is property, etc.
2. "Or where such defendant is found,"
3. Or where the cause of action arose.

Counsel referring to this statute make the statement at page 14 of their brief, that the action could be brought in any county where the defendant was found, and yet counsel in the face of this statement argue that service can be made in any one of the 88 counties of Ohio under process issued from any other one of the 88 counties. It is a very far-fetched and strained argument to say

that because the statute says that an agent must be designated upon whom service may be made "within the state" that the statute therefore says that service can be made **at any point** within the state. This statute very carefully states that this agent for service must be designated **as provided by law,** which refers to the formalities of appointment and certainly the statute means that the process which is served must equally be within the law. It could not be claimed that because the appointment had been made the process could be served out of rule or could be served by an officer not authorized by law to make service. Certainly the bailwick within which service must be made can stand in no different position.

The section providing for this service on the statutory agent must be construed along with Section 11276 of the General Code. The argument of counsel requires that the phrase was **"within the state"** as found in Section 179 of the General Code repeal and nullify the specific provisions of Section 11276 upon the same subject. But these sections deal with service upon foreign corporations and they must be considered together. Counsel do not even attempt to argue that Section 11276 permits service outside the county but their argument is based upon the words **"within the state"** which they say not in words being restricted to any county includes all of the 88 counties.

This anomalous result obtains. The statutory agent could be legally served from any county while a managing agent (see our argument above, p. 23) with exec-

utive authority could be served only in a suit filed in the county where he was found.

The only authority for this is the Nisi Prius case of Blanton vs. Burroughs Adding Machine Company, 13 Ohio N. P. (N. S.), 423. This case has not been considered in a higher court nor has it been followed in any other Ohio decision. The lower court has pointed out (Record, page 23) that there is nothing in the report in this case to show that the cause of action sued on did not arise in the county. An examination of the report shows that evidently the court did not have its attention called to the provisions of Section 11276 of the General Code. In any event the decision is obviously contrary to and in conflict with the plain language of Section 11276.

Counsel for plaintiff also have consistently claimed in all their arguments in this case and now claim (plaintiff's brief, page 17) that the decision in Handy vs. Insurance Co., 37 O. S., 366, permits summons to issue from any of the 88 counties to any of the other 88 counties in Ohio. An examination of the opinion in this case, however, shows that the Supreme Court of Ohio never made any such ruling and that the defendant voluntarily entered its appearance in the case. Having entered its appearance the only question was whether the court had jurisdiction of the **subject matter**, (see 37 O. S. at page 370 of the opinion), not whether it had acquired jurisdiction over the person by notice duly served. We do not quote at length from the opinion but we set forth the following very short and pertinent references which determine what was done.

The defendant in this case filed **a motion to dismiss the action,** not a motion to quash service. (See 37 O. S. near bottom of page 367.)

The court says that the true ground of this motion was

> "* * * that the defendant, upon the facts stated in the petition, was not liable to be sued in that court," (Opinion, p. 370),

for the reason that the cause did not arise in this state.

This was a voluntary appearance and a plea to the merits, so that the insurance company,

> "* * * having voluntarily appeared * * * is not in a position to allege that,
> (a) it was not found in this state, and
> (b) in the county where the action was brought." (See page 371, 37 O.S.)

Section 52 of the old Civil Code (now Gen. Code, Sec. 11276) is quoted. The provision as to the filing of suit in the county where the cause arose at that time only applied to foreign insurance companies. It now **applies to all non-residents including foreign corporations.** The very purpose of this provision was to create an exception to the rule that the defendant must be found in the county. The court states that this provision was intended,

> "* * * to give an additional remedy against foreign insurance companies doing business in this state; namely, to make them liable to actions in the county where the causes of action arose, although they might not have property or debts due in such county, **or might not even** be found in such county." (page 371, 37 O. S.)

The law of this state therefore in 1881 when Handy vs. Insurance Co. was decided was that the defendant had to be found in the county where the suit was filed, unless the cause arose there.

The history of this section (now Gen. Code, Section 11276) must be considered in connection with the history of Gen. Code, 179 (the statutory agent section).

The first legislation of what is now Section 179 was the

Act of April 25, 1893, 90 O. L., 261, and the
Act of May 19, 1894, 91 O. L., 355.

Yet the language (i. e., suit where cause arose) of Section 52 of the old Civil Code, now General Code of Ohio, Section 11276, **was not extended from foreign insurance companies** to all foreign corporations until the amendment of what was then

R. S., 5027, Act of April 17, 1902, 95 O. L., 203.

If in 1893 the legislature of Ohio intended that summons could be sent **from any county** for service in **any other county** upon the statutory agent, why did it nine years later take the trouble to perform a futile act, and say that summons could issue from any county in which the cause of action arose to other county. It could not so issue in 1893 when the statutory agent was created. The act of 1893 (now Section 179, General Code of Ohio) did not say that summons could issue to any county. Nine years later the legislature specifically enacts that it **can issue in certain cases**, which proves that it did not, in the act of 1893 **by implication only**, say that it could **so issue in all cases.**

Counsel have heretofore had the benefit of the comments which we make above concerning the case of Handy vs. Insurance Company and our reference to the history of Section 179 of the General Code of Ohio, but we find nothing in their brief on this subject.

We do not consider it necessary to comment at length on the decisions cited which are under statutes with entirely different phraseology. The Pennsylvania statute is very explicit. Process is defined to include every writ issued by any court having jurisdiction of the **subject matter**. (Kennedy vs. Ins. Co., 165 Pa. St. at page 182.) In Minnesota the plaintiff by explicit provision of statute selects his own county. Olson vs. Osborne & Co., 30 Minn., 444. In Missouri the statute defines process as that issued in any court of the state and the service is to be as valid as if served upon the corporation according to the laws of Missouri or any other state. Stone vs. Travelers Ins. Co., 78 Mo., at page 657.

Moreover, in a recent decision under the same statute, namely State ex rel. vs. Gantt, 274 Mo., 490, at page 509, the Supreme Court of Missouri has distinguished Stone vs. Ins. Co., supra, on the ground that the cause accrued in the county and has explicitly held the statute requiring the appointment of the agent is a statute regarding **service**, not **venue**.

The Ohio statutes clearly provide that a corporation can be sued only in the county where found, or where the cause of action arose, or where it has property which may be seized by the court. Clearly the Common Pleas Court of Hamilton county, Ohio, did not have the bene-

fit of a full argument when it rendered the decision in the case of Blanton vs. Burroughs Adding Machine Company, supra, and certainly the District Court was correct when it found there was no authority under the Ohio law for the issuing of summons from Hamilton county for service in Franklin county.

We therefore insist that irrespective of any other question in the case the District Court was right and committed no error in sustaining the motion to quash the service of the Alias Summons in the State Court upon the ground that service outside of the county of Hamilton was void and of no operative effect.

VII.

NO AUTHORITY FOR ISSUE OF ALIAS SUMMONS IN THE DISTRICT COURT AFTER REMOVAL.

Removal is had under Section 29 of the Judicial Code. (36 Stat., 1095; U. S. Comp. Stat. Ann., Sec. 1011, page 954.) This section after prescribing the process for removal and requiring the filing of a certified copy of the record in the District Court then provides as follows:

> "The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

The removal of the cause transfers whatever is in existence in the State Court to the Federal Court. An

appearance and removal does not constitute a general appearance in the case and all objections to jurisdiction may be presented to the Federal Court after removal. Wabash Railway Company vs. Brow, 164 U. S., 271.

After the present case had been removed counsel for the plaintiff filed a precipe for an Alias Summons with the clerk of the District Court. This precipe is shown at page 15 of the record. No order of the court was made for the issuance of any summons nor did the plaintiff file any pleading or petition of any kind whatsoever in the District Court upon which to issue a summons. He simply filed a precipe asking that the Alias Summons be issued. While the statute provides that the case shall precede as if originally instituted it certainly does not provide for the institution of a new action by removal.

When we read the language of the last sentence of Section 29 of the Judicial Code, quoted above, it is clear that there was no intention of having any **new original process** issue after removal. The section provides that the parties removing the cause shall plead, answer or demur within thirty days after the expiration of the time within which the certified copy is to be filed in the District Court. The section, after providing this rule day, states:

> "and the cause shall **then** proceed in the same manner as if it had been originally commenced in the said District Court."

The statement is that the cause shall **then** proceed. The use of the word "then" at this point is a clear declaration that the proceedings which are to be had in

the District Court are to be **in pursuance** of original process theretofore served. The statute fixes a rule day for pleas and fixes this rule day on the basis of what has been done theretofore in the State Court. After the defendant has made his plea the cause shall then proceed. The meaning of this language is clear and under it the Alias Summons issued in the District Court is a nullity.

There is another comment to be made upon the language of Section 29, Judicial Code. It is stated that the cause shall **then** proceed in the same manner:

> "As if it has been originally commenced in the said District Court."

It is not that the cause shall proceed in the District Court but that it shall proceed as if it had been previously instituted in the District Court and the act of "**proceeding**" is to begin after the rule day. If the proceedings in the State Court were invalid there was nothing commenced in the State Court and hence nothing commenced in the District Court.

The fact that the defendant has a right to have the District Court decide the question as to whether there is any valid proceeding in existence is not inconsistent with the proposition that the state proceedings may be void. The defendant has the right to have the District Court pass on every question including service of process. This is shown by the opinion of this court in the case of Wabash and Western Ry. vs. Brow, 164 U. S. at page 278 of the opinion. If there was no valid service in the State Court there was no action in existence to proceed. The proceedings in the State Court in this case

were a nullity and the only effect of the removal was to afford the defendant an opportunity to present to the Federal Court the question of the validity of the proceedings in the State Court and secure the decision of the Federal Court thereon.

Counsel claim, however, that a decision of the Circuit Court of Appeals for the Sixth Circuit rendered in 1905 in the case of Lebensberger vs. Scofield, 71 C. C. A., 476, 139 Fed. 380, authorizes the issue of such an Alias Summons, and the Lower Court in the present case held the service of the Alias Summons in the District Court valid on the authority of that decision (Record page 23).

An analysis of this decision of the Sixth Circuit shows that the Circuit Court of Appeals never held such an Alias Summons as that in this case to be authorized. In this case of Lebensberger vs. Scofield, the action was filed in the State Court; the plaintiff filed in the State Court, an affidavit for attachment which was levied on certain property of the defendant; the case was removed; and after removal a motion to dismiss the attachment was sustained.

After removal but before the attachment was dissolved a summons was issued and served upon the defendant personally. The defendant filed a motion to set aside the service of summons, the ground stated being that since the commencement of the action she had become a citizen of the State of Ohio, and hence no diversity then existed. The report is not clear as to the exact proceedings but apparently a motion had been made to dismiss the action because the attachment was invalid and the report states

that when the motion to dismiss was overruled the defendant with leave of court withdrew her motion to set aside the service of summons and was granted leave to answer. Subsequently she did answer presenting three defenses, the first of which was that having become a citizen of the State of Ohio the court had no jurisdiction.

The real defense then as to jurisdiction was not that the summons had been issued without authority but that there was no diversity of citizenship. The trial was had and the jury found that the defendant had become a citizen of the State of Ohio before the summons had been served upon her and the Lower Court dismissed the action. The Court of Appeals held that the action should not have been dismissed but the decision is on the theory that jurisdiction had been obtained by the process in attachment and that the summons which was served **was merely a substitute for the usual method of service by publication** in attachment cases, and that certainly the defendant could not complain because she had received personal notice instead of notice by publication.

It is further to be noted in connection with this decision that the court comments upon the fact that the defendant withdrew her motion to set aside the service of summons and filed an answer in which she set up the defense of jurisdiction along with her other defenses to the merits of the petition, and the court remarks that a pleading to the merits before the court has passed upon the matter of jurisdiction is a waiver of the jurisdictional question, citing St. Louis etc. Railway Company vs. McBride 141 U. S. 127.

This decision when fully analyzed shows that in the first place no question was made at any point as to the issuing of a summons in an attachment case, but that the question which was made as to jurisdiction was that the defendant had changed her residence to Ohio and that there was no diversity of citizenship when the summons was served.

The same question, as applicable to attachment cases, has been recently passed upon by the District Court for the Northern District of Ohio in the case of Cleveland and Western Coal Company vs. Hillman and Sons Company 245 Fed. 200. This action was commenced in the State Court and an affidavit for attachment was filed and an order of attachment was levied on certain property of the defendant. The case was removed and the defendant filed a motion to discharge the attachment on the ground that the affidavit was insufficient and this motion was sustained.

After these proceedings the plaintiff filed an affidavit for attachment in the District Court and an attachment was levied on property of the defendant. This attachment was sufficient in form but the motion of the defendant to dismiss the attachment was sustained. We make the following pertinent quotation from the opinion:

> "The order of this court discharging the attachment for want of a sufficient affidavit shows that the entire attachment proceedings were void, and, being void the situation is as if no such proceedings had been begun. * * * In that situation, the filing of a new affidavit, and the issue of a new order of attachment in this court, is the equivalent of beginning an action by the issue and levy of an order of attach-

ment without personal service on the defendant," (from the Opinion, 245 Fed. at page 203).

Such is the situation here. The service of the summons in the State Court was void. Nothing was in existence in the State Court and hence the filing of the precipe and securing the service in the District Court, if it amounted to anything, was an attempt to begin a new action. The plaintiff never began any action in the District Court, and hence the writ was void.

We do not see that it really has any bearing upon the question but the court in the case of Cleveland and Western Coal Company vs. Hillman and Sons Company, **Supra.**, refers to General Code of Ohio, Section 11230, to the effect that an action is pending so as to stop the running of the statute of limitations only when actual service is made within sixty days. The petition in this case was filed April 5, 1919 while the summons was issued out of the District Court more than sixty days later, to-wit, June 23, 1919.

This court has passed upon the matter of notice to defendant after attachment of property and removal, in the case of Clark vs. Wells, 203 U. S. 164. In this case after the attachment had been made in the State Court and after removal, publication was had under the state statute. This was held by this court to be valid and regular and that in pursuance thereof a judgment could be rendered to be satisfied out of the property attached. This court made it clear in the opinion that the basis for subsequent service made after removal was found in the attachment itself, and the court gives operative effect in this connec-

tion to that section which provides for the continuance of an attachment in case of removal, now Section 36 of the Judicial Code (36 Stat. 1098; U. S. Comp. Stat. Ann. Section 1018, page 1027).

This court also comments upon the fact that upon removal the District Court acquired jurisdiction of a case of which the defendant was at least **informed** as was shown by the fact that the removal had been made. This court points out that the property had been seized and that jurisdiction had thereby been acquired to subject the seized property to the judgment of the court. We cite this opinion not as bearing directly upon the question of the authority to issue such Alias Summons in an action not including attachment but in order to show that the issue of process in those cases where an attachment has first been had in the State Court is based **not on the general proposition that the District Court has power to proceed originally and secure jurisdiction by service of process after removal but that the power to pursue attachment proceedings by the service of the required process is based upon the prior existing attachment proceedings theretofore had in the State Court.** This is exactly what the District Court for the Northern District of Ohio decided in the case of the Cleveland & Western Coal Company vs. Hillman & Sons Co. **Supra,** and it is the real basis for the decision in the case of Lebenberger vs. Scoheld, **Supra,** if that opinion is to be construed as making any ruling on the service of process.

We have found no decisions in the books upon the question of the jurisdiction of the District Court after

removal to issue original process. The opinion of this court in the case of Clark vs. Wells, **Supra,** would indicate that no such authority exists, because if authority did exist to issue original process after removal it would not be necessary to seize upon the previous attachment proceedings in the State Court upon which to predicate that authority.

Certainly removal was not intended to afford the plaintiff the opportunity to institute a new action against the defendant.

If jurisdiction is secured over person or property by proceedings before removal undoubtedly the Federal Court has authority to proceed and make every order on the basis of that jurisdiction even to the point of ancillary proceedings to protect property seized or enforce a judgment rendered. Hatcher vs. Hendrie and Bolthoff Mfg. & Supply Co., 68 C. C. A. 19, 133 Fed., 267, where many authorities sustaining this statement are cited. However this power is based upon jurisdiction acquired before the removal whether it has been by personal service or by proceedings **in rem.**

The reports of the lower federal courts are full of cases involving the validity of service of summons and in a great majority of the cases the decisions are made in actions which have been removed from a State Court. The fact that there are no decisions upon the question of the issue of original process after removal goes a long way toward showing that no such jurisdiction exists. On the other hand, the trend of all the decisions is that the removal places in the District Court **just what was in the State Court at the date of removal.**

The issue of this Alias Summons in the District Court certainly was a novel and unusual proceedure. While there is no authority directly upon the subject we feel sure that the language of the statute, Judicial Code Section 29, shows that no such proceedure was contemplated by authority of the removal act, and in the very nature of things Section 29 refers not to an action contemplated by the plaintiff but to an action which is in existence. The issue of the Alias Summons in the District Court was an attempt to institute a new action and the Alias Summons in the District Court in this case was a summons from that court to answer a petition which was never filed in that court, and was a summons to appear in an action which was never instituted in the District Court and which had no existence. The writ itself was therefore a nullity and the motion to quash the service of that writ should have been sustained upon that ground.

As we have stated before, Chipman Ltd. vs. Jeffery Co., will dispose of this case without reference to these additional arguments which we present. But this unique innovation in practice is so obviously contrary to the entire basis of removal that we have extended our argument on this point to greater length than perhaps is called for.

VIII.

THERE WAS NO AUTHORITY FOR SERVICE OF SUMMONS IN THE EASTERN DIVISION.

Addressing ourselves again to the service of the Alias Summons issued out of the District Court, we further contend that summons issued out of the Western division could not be served at Columbus, in Franklin County, in the Eastern Division.

Section 53 of the Judicial Code (36 Stat, 1101; U. S. Comp. Stat. Ann. Sec. 1035, page 1161) covers the matter of institution of actions where the district contains more than one division. We quote the pertinent parts of the section:

> "When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; * * * . All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section."

The language of the preceding section (Judicial Code Sec. 52, 36 Stat. 1103, U. S. Comp. Stat. Ann. Sec. 1034, page 1159) covers the matter of the institution of actions within the state and provides in the same language as the section regarding divisions to the effect that when there is more than one district in the state every suit must be brought in the district where the defendant resides.

Counsel claim under the authority of a decision by the District Court of the Northern District of Ohio that process may issue from one division and be served in the other in the case of a foreign corporation. The authority upon which they rely is McCullough vs. United Grocers Corporation, 247 Fed., 880. In this case the plaintiff, who was a resident of Cleveland, Ohio, in the Eastern Division, filed his petition against a foreign corporation, lodging the same in the office of the clerk of the Eastern Division at Cleveland. Summons was issued and served upon the foreign corporation at Toledo in the Western Division. As a matter of fact the court, although it expressed an opinion upon the question of the service of summons in the Western Division sustained the motion to quash upon the ground that the return showed that service had been made upon the secretary and treasurer of the defendant corporation but that the return did not show that the said secretary and treasurer was also the person having the management of its business in this state as is required by the Ohio Statute for service of summons on a foreign corporation.

The authorities which are cited by the court in McCullough vs. Grocers' Corporation, supra, are the cases of Shaw vs. Quincy Mining Company, 145 U. S., 444, and Southern Pacific Company vs. Denton, 146 U. S., 202. In both these cases the only point involved was whether a foreign corporation could be sued in a District in which the plaintiff himself did not reside and under the statutes as they existed at that time the District Courts in such a case had no jurisdiction.

However, the real question in the present case is not one of **venue** but is whether summons can be served outside of the division in which the petition is filed.

The court will note that the original application filed with the Secretary of State of Ohio fixed the office of the statutory agent at the Ruggery Building in Columbus, Franklin county, Ohio, (Record, page 56) in the Eastern Division as the office of the company. There is nothing to show that the defendant ever was present in the Western Division or had any business or transactions in the Western Division.

Therefore we contend that summons issued in the Western Division could not be served in the Eastern Division. The divisions are established for the convenience of litigants and they are established on the theory that suits will be brought against the defendants in the division in which they are. While it is true that the defendant was not a **resident** of the Eastern Division and hence not clearly within the language of the section, nevertheless there is nothing in the section which specifically authorizes the service of original process outside of the division. It is true that Section 53 states that all mesne and final process may be served and executed in any and all of the divisions of the district but this is "subject to the provisions of this section."

We are not strictly within the letter of the statute in our argument but we certainly are within the spirit of the statute. This court in the case of Pennoyer vs. Neff, 95 U. S., 714, has long ago laid down the rule, which has been affirmed and followed time after time, that there

must be due notice of the pendency of an action and that this must be served within the jurisdiction of the court in order to serve as the basis for a judgment by a court. The divisions are established and each division should be regarded as a separate jurisdiction and the original process should not run outside the jurisdiction. After proper service is made then other process such as calling of witnesses, and execution, for example would run under the statute throughout the district.

IX.

THE DESIGNATION OF THE STATUTORY AGENT WAS BY ITS TERMS FOR SERVICE OF PROCESS FROM STATE COURTS ONLY.

The stipulation or statement which was filed in the office of the Secretary of State is set forth at page 56 of the record and the fourth item thereof is the one which makes the appointment of the agent. We quote the same as follows:

> "Fourth. We hereby appoint Simeon Nash of Columbus, in Franklin County, Ohio, as the person upon whom process may be served in all actions that may be brought against this company in any of the courts of the state, and designate his office at the Ruggery Building in said city as the principal office of the company in the State of Ohio." (Record, page 56.)

We recognize the rule that the Federal Courts will adopt as valid methods of service established by state law, provided that the basis of jurisdiction required by the Federal Courts is present. If service of summons

in the Federal Courts were made upon such a statutory agent and the company were present within the jurisdiction of the court, we have no doubt that a Federal Court would acquire jurisdiction regardless of what the terms of the statute might be, **but not because the stipulation appointed the agent but by reason of the mere fact that process according to law within** the jurisdiction of the court had been served upon such agent.

The argument which we now present is directed to the service of the Alias Summons in the District Court, even assuming there is authority in law for the issuance of any such summons. We say that had this been an original suit filed in the first instance in the District Court, service of summons upon the statutory agent would have been invalid because the document which appointed him agent does not provide for service of process in any actions except those brought in **"courts of the state."**

This court has very clearly held in the case of the Pennsylvania Fire Insurance Company vs. Gold Issue Mining & Milling Co., 243 U. S., 93, that in the case of service upon an agent designated under such a statute there is no restriction to actions arising within the jurisdiction unless the act of designation should so restrict the service and the decision was based upon the fact that the foreign corporation had voluntarily executed a document which appointed an agent for service of summons generally and that such a foreign corporation is bound by the terms of the written instrument in which such appointment is made.

The quotation given above from the statement in which

the agent in this case was appointed shows that the appointment was made only for service of process in the **courts of the state** and since there is no basis for service other than this appointment, the language of that appointment cannot be extended beyond its terms. It is for service of process in actions instituted in the courts of the state and not in the courts of the United States.

As bearing upon this question we note that in the Missouri statute it was considered necessary to specify the Federal Courts. The statute is quoted at page 657 of the opinion in Stone vs. The Travelers Ins. Co., 78 Mo., 655.

We submit that the service of the Alias Summons in the Federal Courts, irrespective of any other reason, is void because the agent was never appointed for service of process in actions instituted in the courts of the United States.

X.

CONCLUSION.

For the various reasons which are assigned we respectfully ask the court to affirm the judgment of the District Court. We have every confidence that it will not be necessary for this Court to consider the various arguments which are presented other than the proposition that this case is ruled by the decision in the case of Chipman, Ltd., vs. Jeffery Co. This case is precisely the same as the **Chipman Case** and although counsel have used a great deal of time in trying to distinguish this case on

the facts they have been unable to point out anything which is present in this case that was not present in the **Chipman Case**, tending to show that the defendant was doing business in the state.

Leaving for the moment the authority of the **Chipman Case** and turning our attention to the Alias Summons in the State Court, we feel certain, if the Court cares to consider the matter, that it will be found that there was no authority under the Ohio statutes for the service of state summons outside of Hamilton county, and that therefore the District Court was correct in quashing the service of Alias Summons in the State Court.

Turning now to the Alias Summons in the Federal Court, we feel equally confident, if the Court considers the points which are made, that the court will find that there was no authority for the issuing of original process after removal which in itself makes the summons a nullity and that the Court also will find that the service of Alias Summons in the District Court was void for the further reason that it was served outside of the Division and that the appointment of the statutory agent did not cover the process issuing from the Federal Courts.

Moreover the plaintiff has the burden of showing its authority for service in Ohio. The defendant was not connected with the State of Ohio in any way in this transaction and there is no reason in natural justice why it should bear the expense and disadvantage of responding at the plaintiff's domicile. The defendant had the moral as well as the legal right to insist that the service of these summons be quashed.

In conclusion, however, we again assert our full confidence in the proposition that the facts of the present case bring it within the decision of the **Chipman Case** and that this Court when it has considered the facts of the present case will not be required to proceed further but will affirm the opinion of the District Court on both motions on the authority of the **Chipman Case.**

Respectfully submitted,

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